CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

71 P.2d – 72 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

COPYRIGHT, 1937, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 71, Nos. 1-7; Vol. 72, Nos. 1-4.

COPYRIGHT, 1941, BY WEST PUBLISHING CO.

CAL.REP.71-72 P.2d
6th Reprint—1984

CASES REPORTED

	Vol.		Page
Aguiar v. Souders, App.	72	P.2d	196
Ahern; Skulte v., App.	71	P.2d	340
Allen; James v., App.	72	P.2d	570
American Trust Co.; Passantino v., App.	72	P.2d	223
Angelus Hospital Ass'n of Los Angeles; Nelson v., App.	72	P.2d	169
Arnott; Trigg v., App.	71	P.2d	330
Aronson v. Bank of America Nat. Trust & Savings Ass'n, Sup.	72	P.2d	548
Asavis; People v., App.	71	P.2d	307
Bacciocco v. Curtis, Sup.	72	P.2d	148
Baker; Burt v., App.	71	P.2d	335
Balmer v. City of Beverly Hills, App.	71	P.2d	854
Bank of America Nat. Trust & Savings Ass'n; Aronson v., Sup.	72	P.2d	548
Bank of America Nat. Trust & Savings Ass'n; Carter v., Sup.	71	P.2d	258
Bank of America Nat. Trust & Savings Ass'n v. Hill, Sup.	71	P.2d	258
Bank of America Nat. Trust & Savings Ass'n v. McLaughlin, App.	71	P.2d	291
Bank of America Nat. Trust & Savings Ass'n v. McLaughlin, Sup.	72	P.2d	554
Bank of America Nat. Trust & Savings Ass'n v. Superior Court in and for City and County of San Francisco, App.	71	P.2d	296
Bank of California v. McCoy, App.	72	P.2d	923
Barney Motor Co.; Commercial Credit Co. v., App.	71	P.2d	279
Barrow v. Santa Monica Builders Supply Co., Sup.	71	P.2d	1108
Bear Film Co. v. Indemnity Ins. Co. of North America, App.	71	P.2d	603
Becker v. Munkelt, Sup.	72	P.2d	882
Beckjord v. Slusher, App.	72	P.2d	563
Beckjord v. Slusher, App.	71	P.2d	820
Beldon's Estate, In re, App.	71	P.2d	326
Bene v. La Grande Laundry Co., App.	71	P.2d	351
Benoit; Provident Land Corporation v., App.	71	P.2d	832
Best v. Smith, App.	71	P.2d	78
Biggs; People v., Sup.	71	P.2d	214
Big Jim Mines v. Superior Court in and for Los Angeles County, Sup.	71	P.2d	67
Birkhofer v. Krumm, App.	72	P.2d	899
Bliss v. California Co-op. Producers, App.	72	P.2d	885
Board of Sup'rs of Los Angeles County; Guaranty Liquidating Corporation v., App.	71	P.2d	931
Board of Sup'rs of Santa Clara County; Dorsa v., App.	72	P.2d	912
Boteler v. Conway, App.	72	P.2d	208
Boyle; People v., App.	71	P.2d	945
Breznikar v. T. J. Topper Co., App.	72	P.2d	895
Brick v. Cazaux, Sup.	71	P.2d	588
Brite; People v., Sup.	72	P.2d	122
Brock v. Superior Court in and for Los Angeles County, Sup.	71	P.2d	209
Brooks v. Johnson, App.	72	P.2d	194
Brown; Kelley v., App.	71	P.2d	345
Brown v. Superior Court of Los Angeles County, App.	72	P.2d	230
Brown's Estate, In re, App.	71	P.2d	345
Bryant; H. & J. Mabury Co. v., Sup.	71	P.2d	1111
Buchignoni v. De Haven, App.	72	P.2d	159
Buckman v. Tucker, Sup.	71	P.2d	69
Burke; People v., App.	72	P.2d	261
Burt v. Baker, App.	71	P.2d	335
Cahn, Inc., v. California Wrecking Co., Sup.	71	P.2d	1113

CASES REPORTED

	Vol.		Page
California Co-op. Producers; Bliss v., App.	72	P.2d	885
California Wrecking Co.; Selig Cahn, Inc., v., Sup.	71	P.2d	1113
Carter v. Bank of America Nat. Trust & Savings Ass'n, Sup.	71	P.2d	258
Cazaux; Brick v., Sup.	71	P.2d	588
Celestin; McCoy v., App.	71	P.2d	936
Chambers; People v., App.	72	P.2d	746
Chavoya v. Industrial Accident Commission, App.	72	P.2d	236
Children's Hospital Soc. of Los Angeles v. Industrial Accident Commission of California, App.	71	P.2d	83
Chloupek; Nicholas v., App.	72	P.2d	561
Christen; San Mateo County v., App.	71	P.2d	88
Christin v. Superior Court in and for Los Angeles County, Sup.	71	P.2d	205
Christy v. Drapeau, App.	71	P.2d	940
C. I. T. Corporation v. Lawson, App.	72	P.2d	210
City and County of San Francisco; Weigle v., App.	72	P.2d	902
City of Beverly Hills; Balmer v., App.	71	P.2d	854
City of Los Angeles; General Petroleum Corporation of California v., Sup.	72	P.2d	551
City of Los Angeles; George v., App.	71	P.2d	601
City of Los Angeles v. Industrial Accident Commission, Sup.	72	P.2d	540
City of Los Angeles v. Los Angeles County, Sup.	72	P.2d	138
Cleaveland v. Inter-City Parcel Service, App.	72	P.2d	179
Cloud v. State Terminal Co., App.	71	P.2d	600
Coffey v. Los Angeles Fireman's Relief Ass'n, App.	71	P.2d	328
Coffin v. Odd Fellow Hall Ass'n of Modesto, Sup.	71	P.2d	266
Coffin's Estate, In re, App.	71	P.2d	295
Collins; Marsden v., App.	72	P.2d	247
Commercial Credit Co. v. Barney Motor Co., App.	71	P.2d	279
Conway; Boteler v., App.	72	P.2d	208
Cook v. Parker, App.	71	P.2d	591
Copp v. Millen, Sup.	72	P.2d	111
Costa v. Neves, App.	72	P.2d	906
Costa; Williams v., App.	72	P.2d	906
Couch v. McGregor, App.	72	P.2d	190
Coverley v. Fred L. Wilke Co., App.	71	P.2d	597
Craig; People v., Sup.	72	P.2d	135
Crawford v. Pacific States Savings & Loan Co., App.	71	P.2d	333
Curtis; Bacciocco v., Sup.	72	P.2d	148
Davidson; People v., App.	72	P.2d	233
De Forest; Lee v., App.	71	P.2d	285
De Haven; Buchignoni v., App.	72	P.2d	159
De La Mar v. Superior Court in and for City and County of San Francisco, App.	71	P.2d	96
Denton; People v., App.	72	P.2d	191
DeParcq v. O'Brien, App.	71	P.2d	326
Dondero; Santos v., App.	71	P.2d	840
Dorosh; Snyder v., App.	72	P.2d	158
Dorsa v. Board of Sup'rs of Santa Clara County, App.	72	P.2d	912
Drapeau; Christy v., App.	71	P.2d	940
Drummey v. State Board of Funeral Directors and Embalmers, App.	71	P.2d	834
Dutton; People v., Sup.	71	P.2d	218
Eastman v. Wamsley, App.	72	P.2d	213
E. Clemens Horst Co. v. Federal Mut. Liability Ins. Co., App.	71	P.2d	599
Everts v. Sunset Farms, Sup.	72	P.2d	543
Falconi, Ex parte, App.	71	P.2d	948
Federal Mut. Liability Ins. Co.; E. Clemens Horst Co. v., App.	71	P.2d	599
Fellows; Southern Pac. Co. v., App.	71	P.2d	75
Ferrigno, Ex parte, App.	71	P.2d	329
First Congregational Church of Glendale v. Los Angeles County, Sup.	71	P.2d	1106

	Vol.		Page
First Nat. Bank v. South San Joaquin Irr. Dist., Sup.	72	P.2d	156
Flaherty; Gordoy v., Sup.	72	P.2d	538
Flynn v. Kumamoto, App.	72	P.2d	248
Foppiano; Rogers v., App.	72	P.2d	239
Fred L. Wilke Co.; Coverley v., App.	71	P.2d	597
Frey v. Garibaldi, App.	72	P.2d	554
Frost v. Mighetto, App.	71	P.2d	932
Fulton v. Webb, Sup.	72	P.2d	744
Galik, Ex parte, App.	72	P.2d	169
Gandy; Leaper v., App.	71	P.2d	303
Garcia v. Sibley, App.	72	P.2d	178
Garibaldi; Frey v., App.	72	P.2d	554
Garrett v. Lannan, App.	71	P.2d	852
Garrett's Estate, In re, App.	71	P.2d	852
Gasser Motors; Riggs v., App.	72	P.2d	172
Gavett; Jameson v., App.	71	P.2d	937
General Petroleum Corporation of California v. City of Los Angeles, Sup.	72	P.2d	551
George v. City of Los Angeles, App.	71	P.2d	601
George Herz & Co. v. Solt, App.	72	P.2d	251
Getty; Lesem v., App.	72	P.2d	183
Gibson v. Mitchell, Sup.	72	P.2d	740
Giguiere; Jesse v., App.	71	P.2d	928
Gill's Estate, In re, App.	72	P.2d	771
Goldberg v. List, Sup.	72	P.2d	136
Golden's Estate, In re, Sup.	72	P.2d	113
Goodwin; People v., Sup.	72	P.2d	551
Gordoy v. Flaherty, Sup.	72	P.2d	538
Gorman v. Superior Court in and for Fresno County, App.	72	P.2d	774
Guaranty Liquidating Corporation v. Board of Sup'rs of Los Angeles County, App.	71	P.2d	931
Hall v. Wolford, App.	71	P.2d	596
Halterman v. Pacific Gas & Electric Co., App.	71	P.2d	855
Hamburgh v. Hys, App.	71	P.2d	301
Hammond; People v., App.	71	P.2d	334
Harris' Estate, In re, Sup.	72	P.2d	873
Hartman, Ex parte, Sup.	71	P.2d	921
Harvey; People v., App.	71	P.2d	841
Hayes; People v., App.	71	P.2d	321
Hazie; Reichle v., App.	71	P.2d	849
Hedden v. Waldeck, Sup.	72	P.2d	114
Hedden; Wright v., Sup.	72	P.2d	114
Henderson; People v., App.	72	P.2d	253
Henry; People v., App.	72	P.2d	915
Henshaw; People v., App.	72	P.2d	167
Herbert v. Lankershim, Sup.	71	P.2d	220
Herz & Co. v. Solt, App.	72	P.2d	251
Hill; Bank of America Nat. Trust & Savings Ass'n v., Sup.	71	P.2d	258
Hiner v. Olson, App.	72	P.2d	890
Horst Co. v. Federal Mut. Liability Ins. Co., App.	71	P.2d	599
Hys; Hamburgh v., App.	71	P.2d	301
H. & J. Mabury Co. v. Bryant, Sup.	71	P.2d	1111
Ibos; Smith v., App.	71	P.2d	847
Indemnity Ins. Co. of North America; Bear Film Co. v., App.	71	P.2d	603
Industrial Accident Commission; Chavoya v., App.	72	P.2d	236
Industrial Accident Commission; City of Los Angeles v., Sup.	72	P.2d	540
Industrial Accident Commission; Northington v., App.	72	P.2d	909
Industrial Accident Commission; Pagones v., App.	72	P.2d	888

	Vol.		Page
Industrial Accident Commission of California; Children's Hospital Soc. of Los Angeles v., App.	71	P.2d	83
Ingels; Morales v., App.	72	P.2d	172
Inter-City Parcel Service; Cleaveland v., App.	72	P.2d	179
James v. Allen, App.	72	P.2d	570
Jameson v. Gavett, App.	71	P.2d	937
Jesse v. Giguiere, App.	71	P.2d	928
J. H. Krumlinde & Co.; Yates v., App.	71	P.2d	298
Johnson; Brooks v., App.	72	P.2d	194
Justice Court of Township of Santa Ana; McCoy v., App.	71	P.2d	1115
Kaloutsis v. Maltos, Sup.	71	P.2d	68
Katzer; Syler v., App.	72	P.2d	202
Kelley v. Brown, App.	71	P.2d	345
Kern County v. Woody, Sup.	71	P.2d	268
Kimball; People v., App.	72	P.2d	157
Kiser; People v., App.	71	P.2d	98
Knaesche, Ex parte, App.	72	P.2d	216
Knutsen; Nolander v., App.	71	P.2d	843
Kretchmar; People v., App.	72	P.2d	243
Krumm; Birkhofer v., App.	72	P.2d	899
Kuhn v. Valley Meat Co., App.	72	P.2d	164
Kumamoto; Flynn v., App.	72	P.2d	248
La Grande Laundry Co.; Bene v., App.	71	P.2d	351
Landowitz, In re, App.	71	P.2d	334
Lankershim; Herbert v., Sup.	71	P.2d	220
Lannan; Garrett v., App.	71	P.2d	852
Lantz; Miller v., Sup.	71	P.2d	585
Lawson; C. I. T. Corporation v., App.	72	P.2d	210
Layne & Bowler Corporation; Paul v., Sup.	71	P.2d	817
Leach; People v., App.	71	P.2d	594
Leaper v. Gandy, App.	71	P.2d	303
Leatham; Martin v., App.	71	P.2d	336
Lee v. De Forest, App.	71	P.2d	285
Lee; People v., App.	72	P.2d	572
Lesem v. Getty, App.	72	P.2d	183
Lininger; People v., App.	71	P.2d	306
List; Goldberg v., Sup.	72	P.2d	136
Little's Estate, In re, App.	72	P.2d	213
Lohmann & Nowell; McColgan v., App.	72	P.2d	764
Los Angeles, City of, v. Industrial Accident Commission, Sup.	72	P.2d	540
Los Angeles, City of, v. Los Angeles County, Sup.	72	P.2d	138
Los Angeles County; City of Los Angeles v., Sup.	72	P.2d	138
Los Angeles County; First Congregational Church of Glendale v., Sup.	71	P.2d	1106
Los Angeles County; Los Angeles Shipbuilding & Dry Dock Corporation v., App.	71	P.2d	282
Los Angeles Fireman's Relief Ass'n; Coffey v., App.	71	P.2d	328
Los Angeles Shipbuilding & Dry Dock Corporation v. Los Angeles County, App.	71	P.2d	282
Lucy v. Lucy, App.	71	P.2d	949
Mabury Co. v. Bryant, Sup.	71	P.2d	1111
McCarthy v. McCarthy, App.	72	P.2d	255
McClelland v. Shaw, App.	72	P.2d	225
McColgan v. Lohmann & Nowell, App.	72	P.2d	764
McCoy; Bank of California v., App.	72	P.2d	923
McCoy v. Celestin, App.	71	P.2d	936
McCoy v. Justice Court of Township of Santa Ana, App.	71	P.2d	1115
McCune v. McCune, App.	72	P.2d	883
McGregor; Couch v., App.	72	P.2d	190
McLaughlin; Bank of America Nat. Trust & Savings Ass'n v., App.	71	P.2d	291

	Vol.		Page
McLaughlin; Bank of America Nat. Trust & Savings Ass'n v., Sup.	72	P.2d	554
MacPherson v. Superior Court in and for Los Angeles County, App.	71	P.2d	91
Maggio Bros. Co.; Ure v., App.	71	P.2d	598
Maltos; Kaloutsis v., Sup.	71	P.2d	68
Manzo; People v., Sup.	72	P.2d	119
Marsden v. Collins, App.	72	P.2d	247
Martin v. Leatham, App.	71	P.2d	336
Mazgedian v. Swift & Co., App.	71	P.2d	833
Mighetto; Frost v., App.	71	P.2d	932
Millen; Copp v., Sup.	72	P.2d	111
Miller v. Lantz, Sup.	71	P.2d	585
Miller v. Superior Court in and for Los Angeles County, Sup.	72	P.2d	868
Miller's Estate, In re, App.	71	P.2d	1117
Mills; People v., App.	71	P.2d	946
Mitchell; Gibson v., Sup.	72	P.2d	740
Modesto Irr. Dist.; United Lumber Yards v., App.	72	P.2d	221
Mondine v. Sarlin, App.	72	P.2d	930
Montijo's Estate, In re, App.	72	P.2d	178
Moore; Packard v., Sup.	71	P.2d	922
Morales v. Ingels, App.	72	P.2d	172
Morris v. Poundstone, Sup.	71	P.2d	262
Morris v. South San Joaquin Irr. Dist., Sup.	72	P.2d	154
Munkelt; Becker v., Sup.	72	P.2d	882
Nelson v. Angelus Hospital Ass'n of Los Angeles, App.	72	P.2d	169
Nelson v. Sweitzer, App.	71	P.2d	85
Neves; Costa v., App.	72	P.2d	906
Nicholas v. Chloupek, App.	72	P.2d	561
Nielson; People v., App.	72	P.2d	200
Nobel v. You Bet Mining Co., App.	72	P.2d	205
Nolander v. Knutsen, App.	71	P.2d	843
Northington v. Industrial Accident Commission, App.	72	P.2d	909
O'Brien; De Parcq v., App.	71	P.2d	326
Ocean Shore R. R.; People v., App.	72	P.2d	167
Odd Fellow Hall Ass'n of Modesto; Coffin v., Sup.	71	P.2d	266
Ohio Farmers Ins. Co.; Ziegler v., App.	72	P.2d	557
Olson; Hiner v., App.	72	P.2d	890
One La Salle Four-Door Sedan; People v., App.	72	P.2d	766
One Pontiac 8 Sedan, Engine No. 8-73976; People v., App.	71	P.2d	302
Pacific Gas & Electric Co.; Halterman v., App.	71	P.2d	855
Pacific Greyhound Lines v. Superior Court of City and County of San Francisco, Sup.	72	P.2d	883
Pacific Indemnity Co.; Woodman v., App.	72	P.2d	256
Pacific States Savings & Loan Co.; Crawford v., App.	71	P.2d	333
Packard v. Moore, Sup.	71	P.2d	922
Pagones v. Industrial Accident Commission, App.	72	P.2d	888
Parker; Cook v., App.	71	P.2d	591
Passantino v. American Trust Co., App.	72	P.2d	223
Patubo; People v., Sup.	71	P.2d	270
Paul v. Layne & Bowler Corporation, Sup.	71	P.2d	817
People v. Asavis, App.	71	P.2d	307
People v. Biggs, Sup.	71	P.2d	214
People v. Boyle, App.	71	P.2d	945
People v. Brite, Sup.	72	P.2d	122
People v. Burke, App.	72	P.2d	261
People v. Chambers, App.	72	P.2d	746
People v. Craig, Sup.	72	P.2d	135
People v. Davidson, App.	72	P.2d	233
People v. Denton, App.	72	P.2d	191
People v. Dutton, Sup.	71	P.2d	218

	Vol.		Page
People v. Goodwin, Sup.	72	P.2d	551
People v. Hammond, App.	71	P.2d	334
People v. Harvey, App.	71	P.2d	841
People v. Hayes, App.	71	P.2d	321
People v. Henderson, App.	72	P.2d	253
People v. Henry, App.	72	P.2d	915
People v. Henshaw, App.	72	P.2d	167
People v. Kimball, App.	72	P.2d	157
People v. Kiser, App.	71	P.2d	98
People v. Kretchmar, App.	72	P.2d	243
People v. Leach, App.	71	P.2d	594
People v. Lee, App.	72	P.2d	572
People v. Lininger, App.	71	P.2d	306
People v. Manzo, Sup.	72	P.2d	119
People v. Mills, App.	71	P.2d	946
People v. Nielson, App.	72	P.2d	200
People v. Ocean Shore R. R., App.	72	P.2d	167
People v One La Salle Four-Door Sedan, App.	72	P.2d	766
People v. One Pontiac 8 Sedan, Engine No. 8-73976, App.	71	P.2d	302
People v. Patubo, Sup.	71	P.2d	270
People v. Planer, App.	72	P.2d	767
People v. Righthouse, Sup.	72	P.2d	867
People v. Roseberry, App.	71	P.2d	944
People v. Sberno, two cases, App.	71	P.2d	274
People v. Southern Pac. R. Co., App.	72	P.2d	254
People v. Thompson, App.	72	P.2d	927
People v. Tillotson, App.	72	P.2d	558
People v. 237 30-lb. Cans of Whole Hen Eggs, App.	72	P.2d	929
People v. Wilhelm, Sup.	71	P.2d	815
Phillips v. Southern California Edison Co., App.	72	P.2d	769
Planer; People v., App.	72	P.2d	767
Poundstone; Morris v., Sup.	71	P.2d	262
Provident Irr. Dist.; Provident Land Corporation v., App.	71	P.2d	832
Provident Land Corporation v. Benoit, App.	71	P.2d	832
Provident Land Corporation v. Provident Irr. Dist., App.	71	P.2d	832
Provident Land Corporation v. Zumwalt, App.	71	P.2d	825
Reichle v. Hazie, App.	71	P.2d	849
Riggs v. Gasser Motors, App.	72	P.2d	172
Righthouse; People v., Sup.	72	P.2d	867
Rocha v. Superior Wheeler Cake Corporation, App.	72	P.2d	238
Rogers v. Foppiano, App.	72	P.2d	239
Rohlffs; Wight v., Sup.	72	P.2d	142
Roseberry; People v., App.	71	P.2d	944
Rosenberg, Ex parte, App.	72	P.2d	559
Rosher v. Superior Court in and for Los Angeles County, Sup.	71	P.2d	918
Rozewski v. Simpson, Sup.	71	P.2d	72
Russell v. Russell, App.	72	P.2d	219
Russell's Estate, In re, App.	72	P.2d	219
Salazar v. Steelman, App.	71	P.2d	79
San Fernando Refining Co.; Stewart v., App.	71	P.2d	1118
San Mateo County v. Christen, App.	71	P.2d	88
Santa Monica Builders Supply Co.; Barrow v., Sup.	71	P.2d	1108
Santos v. Dondero, App.	71	P.2d	840
Sarlin; Mondine v., App.	72	P.2d	930
Sberno; People v., two cases, App.	71	P.2d	274
Scott v. Security Title Insurance Guarantee Co., Sup.	72	P.2d	143
Security Title Insurance Guarantee Co.; Scott v., Sup.	72	P.2d	143
Selig Cahn, Inc., v. California Wrecking Co., Sup.	71	P.2d	1113
Shaw; McClelland v., App.	72	P.2d	225

	Vol.		Page
Sibley; Garcia v., App.	72	P.2d	178
Simpson; Rozewski v., Sup.	71	P.2d	72
Skulte v. Ahern, App.	71	P.2d	340
Slusher; Beckjord v., App.	72	P.2d	563
Slusher; Beckjord v., App.	71	P.2d	820
Smith; Best v., App.	71	P.2d	78
Smith v. Ibos, App.	71	P.2d	847
Snyder v. Dorosh, App.	72	P.2d	158
Solt; George Herz & Co. v., App.	72	P.2d	251
Solt; Herz & Co. v., App.	72	P.2d	251
Souders; Aguiar v., App.	72	P.2d	196
Southern California Edison Co.; Phillips v., App.	72	P.2d	769
Southern Pac. Co. v. Fellows, App.	71	P.2d	75
Southern Pac. R. Co.; People v., App.	72	P.2d	254
South San Joaquin Irr. Dist.; First Nat. Bank v., Sup.	72	P.2d	156
South San Joaquin Irr. Dist.; Morris v., Sup.	72	P.2d	154
Spellacy v. Superior Court in and for Los Angeles County, App.	72	P.2d	262
Stanridge, Ex parte, App.	72	P.2d	162
State Board of Funeral Directors and Embalmers; Drummey v., App.	71	P.2d	834
State Terminal Co.; Cloud v., App.	71	P.2d	600
Steelman; Salazar v., App.	71	P.2d	79
Stewart v. San Fernando Refining Co., App.	71	P.2d	1118
Summers v. Woods, App.	72	P.2d	258
Sunset Farms; Everts v., Sup.	72	P.2d	543
Superior Court in and for City and County of San Francisco; Bank of America Nat. Trust & Savings Ass'n v., App.	71	P.2d	296
Superior Court in and for City and County of San Francisco; De La Mar v., App.	71	P.2d	96
Superior Court in and for Fresno County; Gorman v., App.	72	P.2d	774
Superior Court in and for Los Angeles County; Big Jim Mines v., Sup.	71	P.2d	67
Superior Court in and for Los Angeles County; Brock v., Sup.	71	P.2d	209
Superior Court in and for Los Angeles County; Christin v., Sup.	71	P.2d	205
Superior Court in and for Los Angeles County; MacPherson v., App.	71	P.2d	91
Superior Court in and for Los Angeles County; Miller v., Sup.	72	P.2d	868
Superior Court in and for Los Angeles County; Rosher v., Sup.	71	P.2d	918
Superior Court in and for Los Angeles County; Spellacy v., App.	72	P.2d	262
Superior Court in and for Los Angeles County; Swayne & Hoyt v., App.	72	P.2d	231
Superior Court of City and County of San Francisco; Pacific Greyhound Lines v., Sup.	72	P.2d	883
Superior Court of Los Angeles County; Brown v., App.	72	P.2d	230
Superior Wheeler Cake Corporation; Rocha v., App.	72	P.2d	238
Swayne & Hoyt v. Superior Court in and for Los Angeles County, App.	72	P.2d	231
Sweitzer; Nelson v., App.	71	P.2d	85
Swift & Co.; Mazgedian v., App.	71	P.2d	833
Syler v. Katzer, App.	72	P.2d	202
System Auto Parks; U Drive & Tour v., Super.	71	P.2d	354
Templar Mining Co. v. Williams, App.	72	P.2d	566
Thompson; People v., App.	72	P.2d	927
Tillotson; People v., App.	72	P.2d	558
T. J. Topper Co.; Breznikar v., App.	72	P.2d	895
Trigg v. Arnott, App.	71	P.2d	339
Tucker; Buckman v., Sup.	71	P.2d	69
237 30-lb. Cans of Whole Hen Eggs; People v., App.	72	P.2d	929
U Drive & Tour v. System Auto Parks, Super.	71	P.2d	354
United Lumber Yards v. Modesto Irr. Dist., App.	72	P.2d	221
Ure v. Maggio Bros. Co., App.	71	P.2d	598
Valley Meat Co.; Kuhn v., App.	72	P.2d	164

	Vol.		Page
Wachs v. Wachs, App.	71	P.2d	323
Waldeck; Hedden v., Sup.	72	P.2d	114
Wamsley; Eastman v., App.	72	P.2d	213
Webb; Fulton v., Sup.	72	P.2d	744
Weigle v. City and County of San Francisco, App.	72	P.2d	902
Wight v. Rohlffs, Sup.	72	P.2d	142
Wilhelm; People v., Sup.	71	P.2d	815
Williams v. Costa, App.	72	P.2d	906
Williams; Templar Mining Co. v., App.	72	P.2d	566
Wolford; Hall v., App.	71	P.2d	596
Woodman v. Pacific Indemnity Co., App.	72	P.2d	256
Woods; Summers v., App.	72	P.2d	258
Woods' Estate, In re, App.	72	P.2d	258
Woody; Kern County v., Sup.	71	P.2d	268
Wright v. Hedden, Sup.	72	P.2d	114
Yates v. J. H. Krumlinde & Co., App.	71	P.2d	298
You Bet Mining Co.; Nobel v., App.	72	P.2d	205
Ziegler v. Ohio Farmers Ins. Co., App.	72	P.2d	557
Zumwalt; Provident Land Corporation v., App.	71	P.2d	825

CALIFORNIA REPORTER

IN VOLUME

71 PACIFIC REPORTER
SECOND SERIES

---

9 Cal.2d 503

BIG JIM MINES, Inc., et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.
L. A. 16264.

Supreme Court of California.

Aug. 24, 1937.

1. Prohibition ⚷13

Where superior court entered judgment restraining corporation, its directors, and its general manager, from enforcing stockholders' assessment and taking further steps with corporation's internal affairs and management, prohibition would not lie to prohibit court from making other orders or judgments affecting corporation, directors, or general manager in same action, in absence of showing that court contemplated further action, since such judgment was "final" and appealable.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

2. Prohibition ⚷13

Function of writ of prohibition is to prevent performance of judicial acts, and it does not lie to review proceedings already completed, nor after entry of judgment when there are no further judicial acts to be performed.

In Bank.

Petition for writ of prohibition by the Big Jim Mines, Incorporated, and others, against the Superior Court of the State of California in and for the County of Los Angeles.

Petition denied, and alternative writ discharged.

Emmett A. Tompkins and Franklin W. Peck, both of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, and Paul E. Iverson, all of Los Angeles, for respondent.

EDMONDS, Justice.

Big Jim Mines, Inc., a corporation, its directors, and its general manager, seek a writ of prohibition directed to the respondent court. The petitioners allege that Big Jim Mines, Inc., is a corporation organized and existing under the laws of the State of Arizona; that "the stockholders, at Phœnix, Arizona, voted a one-half cent assessment" upon all of the stock of the corporation issued and outstanding; that certain stockholders of the corporation then brought an action in the respondent court to restrain the collection of the assessments; and that after trial the court "made and entered a judgment in favor of plaintiffs and against the defendants restraining said assessment, and restraining petitioners from taking any further steps with the internal affairs and management of" the corporation.

[1, 2] In response to an alternative writ of prohibition issued by this court, the respondents have presented a general demurrer to the petition for the writ and an answer thereto. The demurrer must be sustained as the allegations of the petition show that the petitioners are not entitled to the relief demanded. The writ of prohibition cannot be used to review proceedings already completed. Its function is to prevent the performance of judicial acts. It does not lie after judgment is entered where there are no further judicial acts to be performed. State Board of Equalization v. Superior Court (Cal.Sup.) 70 P.(2d) 482; Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377,

220 P. 306. While the petitioners by this proceeding attempt to prohibit the respondent court "from making any other orders or judgments affecting petitioners herein based upon the allegations or prayer of the complaint" in the action referred to, the petition clearly shows that the judgment which has been entered is a final judgment from which an appeal will lie and there is no claim that any further action by the respondent court is contemplated.

The petition is denied, and the alternative writ is discharged.

We concur: LANGDON, J.; CURTIS, J.; SEAWELL, J.; NOURSE, Justice pro tem.

---

9 Cal.2d 493

KALOUTSIS et al. v. MALTOS et al.

Sac. 4816.

Supreme Court of California.

Aug. 24, 1937.

Injunction 🔑32

Where defendants in justice's court action brought action with respect to same controversy, which was beyond jurisdiction of justice's court, in superior court praying that first action be restrained pending determination of superior court proceeding and superior court, for reasons not shown by record, refused to enjoin justice's court proceeding, plaintiffs were entitled to reversal.

In Bank.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Action by Peter Kaloutsis and another against S. Maltos and another. From an order denying application for an injunction, plaintiffs appeal.

Reversed, with directions.

Edward T. Taylor, of Modesto, for appellants.

Preston & Braucht, of Merced, for respondents.

LANGDON, Justice.

This is an action to enjoin a proceeding pending between the parties in the justice's court.

Plaintiffs Kaloutsis and Papulis were engaged with defendant Maltos in a joint venture, raising and marketing vegetables. A dispute having arisen between them, Maltos commenced an action against Kaloutsis and Papulis, in the justice's court, attaching equipment of the joint venture. Thereafter, Kaloutsis and Papulis, as plaintiffs, commenced this action against Maltos in the superior court, seeking relief with respect to the same controversy, in the sum of $649.94, which amount was beyond the jurisdiction of the justice's court; and also praying that the first action, in the justice's court, be restrained pending determination of the superior court proceeding. The lower court issued a temporary restraining order, but thereafter denied the application for an injunction. Plaintiffs appealed.

Respondents have filed no brief, and no oral argument was made. The matter was argued orally in the lower court, and there is nothing in the record to show why the relief sought for was denied. Under these circumstances, appellants are entitled to a reversal, for the rule is well settled that where a defendant in a justice's court action has a claim against the plaintiff arising out of the same transaction, but in excess of the jurisdiction of the court, he may bring a suit in the superior court, and then enjoin the justice's court action, in order that the entire controversy may be settled in the court which has jurisdiction over the larger claim. Gregory v. Diggs, 113 Cal. 196, 45 P. 261; Engleman v. Superior Court, 105 Cal.App. 754, 288 P. 723; Kane v. Mendenhall, 5 Cal.(2d) 749, 756, 56 P.(2d) 498.

The judgment is reversed with directions to the trial court to grant the injunction as prayed for.

We concur: EDMONDS, J.; CURTIS, J.; SEAWELL, J.; NOURSE, Justice pro tem.

9 Cal.2d 403

BUCKMAN v. TUCKER.

Sac. 5126.

Supreme Court of California.

Aug. 23, 1937.

1. Execution 🔑276(2)

A collateral issue such as set-off cannot be considered in summary supplemental proceedings arising upon the court's order that judgment creditor make restitution of property acquired by him under a judgment that has been reversed (Code Civ.Proc. §§ 438, 957).

2. Set-off and counterclaim 🔑1

Statute permitting a counterclaim if it tend to diminish or defeat plaintiff's recovery was designed to avoid a multiplicity of suits and does not require that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim (Code Civ.Proc. § 438).

3. Execution 🔑276(2)

A counterclaim may be maintained in an action for money had and received although such action is to recover money under a judgment subsequently reversed for prematurity of action where the action in which the counterclaim is filed is not the summary supplemental procedure provided for by statute for securing restitution after a judgment has been reversed, but is an independent action and the counterclaim is filed after the debt on which the judgment had been obtained has matured (Code Civ. Proc. §§ 438, 957).

4. Appeal and error 🔑1170(7)

The undue restriction of examination of plaintiff was not reversible error where the evidence sought to be thus secured was introduced substantially in another manner (Const. art. 6, § 4½).

5. Interest 🔑49

In action to secure restitution of money which defendant had obtained by execution on a judgment subsequently reversed for prematurity of action, defendant, who was allowed to set off the amount of his original claim which in the meantime had matured, was not entitled to interest on such claim subsequent to the date upon which he had secured execution since after that date the money was in his own control.

In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by K. A. Buckman against David Thompson, wherein Ida Tucker was substituted as executrix of the last will and testament of defendant, and a counterclaim was filed. From a judgment allowing both demands and in favor of defendant for the difference, the plaintiff appeals.

Modified and affirmed.

Prior opinion, 63 P.(2d) 846.

J. O. Stemmler and Walter F. Lynch, both of Stockton, for appellant.

Charles P. Snyder and George F. Snyder, both of San Andreas, and Joseph Delucchi, of Stockton, for respondent.

SEAWELL, Justice.

David Thompson, since deceased, on September 8, 1934, brought an action against appellant, K. A. Buckman, in a class A justice's court in San Joaquin county to recover the sum of $439.72, plus interest from July 16, 1934, which sum was claimed to be due from Buckman to Thompson for money alleged to have been paid by Thompson for the use and benefit of Buckman. In that action Thompson attached certain moneys of Buckman. Subsequently that action proceeded to trial, resulting in a judgment for Thompson in the sum of $439.72 plus $8.95 costs. Buckman appealed to the superior court, but did not file a stay bond. Thompson secured the issuance of a writ of execution and collected the amount of his judgment on February 18, 1935. In May of 1935, a trial de novo was had in the superior court and, on the 28th of that month, the superior court caused to be entered a judgment of dismissal of Thompson's action on the ground that, under the agreement of the parties, it had been prematurely brought—that the debt would not mature until July, 1935. It is here to be noted that Buckman did not at that time in that action seek restitution of the money secured by Thompson under the execution, as she might have done under the procedure outlined in section 957 of the Code of Civil Procedure. See 2 Cal.Jur. 1000, § 592.

Thereafter, and on July 10, 1935, Buckman commenced the present action against Thompson in the superior court of Calaveras county, residence of Thompson, on a money had and received complaint, for

$454.46, that sum concededly including the $439.72 plus $8.95 costs awarded Thompson by the justice's court, plus the costs of the execution. Thompson thereafter on July 24, 1935, filed a pleading entitled "Answer and Cross-Complaint," denying the allegations of the complaint and asserting by way of counterclaim and cross-complaint the identical claim for $439.72 plus interest that had been the subject of the justice's court action. This claim, by the time the answer was filed, had matured. In the trial court Buckman contended, and now contends here, that inasmuch as her action for money had and received is to recover for money paid under a judgment later reversed, such action is one for restitution, and that it is not proper nor permissible in such action for the defendant to set up a counterclaim or set-off. The trial court rejected this contention. After a trial on the merits, the court found that in February, 1935, Thompson received the sum of $454.46 to and for the use of Buckman; that Buckman did not demand interest; that on July 16, 1934, Thompson, at the request of Buckman, advanced for her account and benefit $439.72; that Buckman promised to repay the same on or before July 1, 1935, but failed to do so; that interest on said sum from July 16, 1934, to October 29, 1935, is $38.57; that Thompson's counterclaim does tend to diminish and defeat Buckman's recovery; and that the two claims originated out of the same transaction. The court thereupon granted a judgment in favor of Thompson for $23.83, that sum being the difference between the amount borrowed by Buckman ($439.72 plus interest of $38.57) and the amount received by Thompson on the execution, $454.46.

On this appeal appellant's main contention is that a set-off or counterclaim cannot be set up in an action based upon an attempt by a plaintiff to recover money or property seized under a judgment subsequently reversed or vacated. It is respondent's contention that under section 438 of the Code of Civil Procedure, as amended in 1927 (St. 1927, p. 1620), such right of set-off exists.

[1] It is undoubtedly true that most courts have held that in a proceeding for restitution, upon reversal or vacation of the judgment, the claim for restitution is not subject to a claim of set-off. The subject is discussed in an annotation appearing in 101 A.L.R. 1148. In that annotation five cases are relied upon as sustaining the view that a set-off cannot be allowed in such an action. A California case, Levy v. Drew, 4 Cal.(2d) 456, 50 P.(2d) 435, 101 A.L.R. 1144, is also referred to. This case will be discussed later. The five cases referred to are: Morgan v. Hart, 9 B.Mon.(48 Ky.) 79; Conover v. Scott, 11 N.J.Law, 400; First National Bank of Atcheson v. Price, 65 Kan. 853, 70 P. 938; Plaza Farmers' Union Warehouse & El. Co. v. Tomlinson, 183 Wash. 617, 49 P.(2d) 36, 101 A.L.R. 417; and Hier v. Anheuser-Busch Brewing Ass'n, 60 Neb. 320, 83 N.W. 77. In our opinion, the reasoning of those cases is not persuasive here. In the first place, in the first four of the above cases the proceeding was in fact a summary proceeding for restitution. Either the appellate court at the time of reversal had summarily ordered restitution, or the trial court, pursuant to motion, had made such summary order. In such summary proceeding it was correctly held that it would tend to confuse the issue to permit a set-off. Those cases would undoubtedly be in point if, upon reversal of the justice's court decision, the superior court had ordered restitution pursuant to the summary procedure outlined in section 957 of the Code of Civil Procedure. It is quite clear that in a summary supplemental proceeding of that character collateral issues, such as a right of set-off, should not and cannot be considered. These cases cannot be held to be determinative of the situation here presented. In this case Buckman did not avail herself of the summary procedure that was open to her. She elected to commence an independent action for money had and received. The cause of action is simply set forth in a common count. There is nothing on the face of the complaint to indicate that the action was for restitution of money secured under a reversed judgment. We are of the opinion that, having elected to proceed in an independent action of such a nature, it must be held that such action differs in no way from any other action based on implied contract and that a defendant may counterclaim for any claim falling within section 438 of the Code of Civil Procedure. It is true that in the Hier v. Anheuser-Busch Brewing Ass'n Case, supra, the proceeding was not summary nor supplemental, but was an independent action. Not only was it an action for restitution, but the decision was based entirely on common-law principles. No reference was made to any statute comparable to section 438 of the Code of Civil Procedure.

Appellant places great reliance on the case of Levy v. Drew, supra. In that case Drew sued a corporation for money allegedly due him. In that action he attached the corporate bank account. The corporation defaulted, execution issued, and Drew collected the sum due him. Thereafter the judgment was vacated, the default opened, and an answer filed. This took place in 1927. The cause was never brought to trial and was dismissed for lack of prosecution in 1933. In 1928 the corporate defendant was declared an involuntary bankrupt and Levy was appointed trustee. In 1929, Levy, as trustee, commenced an action to recover the money collected under the judgment subsequently vacated. Drew sought to offset his claim against the corporation. The court held that under the bankruptcy law Drew could not offset his claim against the claim of the trustee for restitution. At page 460 of 4 Cal.(2d), page 436 of 50 P.(2d), 101 A.L.R. 1144, the court held:

"It is equally well settled that the unauthorized possession of funds of the bankrupt can give the creditor no right to apply them to the payment of his own claim to the prejudice of the rights of other creditors," citing many federal cases.

It is true that there is some general language in that case tending to indicate that a right of set-off does not exist whenever an action for restitution is involved. Most of the cases cited in the opinion involved the rights of third persons. In so far as the language indicates that where only the rights of debtor and creditor are involved, a counterclaim cannot be maintained, such language was merely dicta. The only question involved therein was whether under the Bankruptcy Act, where the rights of other creditors were involved, a right of set-off could be exercised. That turned entirely upon an interpretation of the federal statute, the federal cases having already decided the question adversely to the counter-claimant. The provisions of section 438 of the Code of Civil Procedure were not involved nor referred to in the opinion. The case cannot be held to be authority here.

[2] So far as pertinent here, section 438, as amended in 1927, provides:

"The counterclaim * * * must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; * * * and provided further, that the court may, in its discretion, order the counterclaim to be tried separately from the claim of plaintiff."

The proper interpretation of this section was before this court in Terry Trading Corporation v. Barsky, 210 Cal. 428, 435, 292 P. 474, 477, where it was stated:

"Under the amendment to section 438 of the Code of Civil Procedure, adopted in 1927 and prior to the filing of the answer and cross-complaint herein, the sole requisites of a counterclaim are that it 'must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.' All of the other limitations were abolished by this amendment, and an intent on the part of the Legislature to avoid multiplicity of suits and to have all conflicting claims between the parties settled in a single action was most clearly manifested. * * * Under the amendment it is not necessary that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim. Indeed, the statute contemplates the pleading of unrelated matters as counterclaims by providing that 'the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff.'" See, also, Thomsen v. Culver City Motor Co., Inc., 4 Cal.App.(2d) 639, 41 P.(2d) 597.

[3] Applying the reasoning of these cases to the instant case, we are of the opinion that defendant could properly counterclaim for the indebtedness due from plaintiff. It would certainly not tend to prevent circuity of action and multiplicity of suits to permit plaintiff to proceed to judgment on her claim and to compel defendant to maintain an independent action on his claim, when the two matters could so easily be determined in the same action.

[4] The appellant likewise complains of the exclusion of certain evidence. A reading of the record indicates that although the trial court unduly restricted the examination of plaintiff, the evidence sought to be thus secured was introduced substantially in another manner. In any event, under section 4½ of article 6 of the Constitution, no reversible error was thus committed.

[5] However, the judgment of the trial court was clearly incorrect in respect to its allowance of interest. The trial court correctly found that on July 16, 1934,

Thompson loaned to the plaintiff the sum of $439.72. The court allowed interest on this amount at the rate of 7 per cent. from that date until October 29, 1935, amounting to $38.57. This was erroneous. Defendant, Thompson, had execution issued on February 18, 1935. It is obvious from the date that the defendant thus came into possession of the money that he had dominion and control thereof, and interest should have terminated on that date. The allowance for interest should have been from July 16, 1934, to February 18, 1935, at 7 per cent. and would amount to the sum of $18.12 instead of $38.57, a difference of $20.45. The judgment, therefore, is excessive to the extent of $20.45 and should be modified by deducting the amount of $20.45 from $23.83, leaving the correct amount of the judgment as $3.38. It is ordered that the judgment be so modified, and, as modified, it is affirmed. The respondent is to recover her costs.

We concur: EDMONDS, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; NOURSE, Justice pro tem.

---

9 Cal.2d 515

ROZEWSKI et al. v. SIMPSON et al.

Sac. 4895.

Supreme Court of California.

Aug. 25, 1937.

1. Waters and water courses 🔑263

In action for damages for flooding of land with irrigation waters from defendants' adjoining rice farm, evidence sustained finding that injury was caused by acts of plaintiffs, so as to relieve defendants from liability, where water ran onto plaintiffs' land through check box constructed in levee by plaintiffs for their own use and benefit in obtaining water.

2. Appeal and error 🔑1068(1)

Plaintiffs, who relied on theory of absolute liability, could not complain on appeal that instructions on negligence were given as well as instructions on absolute liability, where jury found against plaintiffs on issues framed by themselves.

In Bank.

Appeal from Superior Court, Yuba County; Arthur Coates, Judge.

Action by Karl Rozewski and others against J. J. Simpson and others. From a judgment in favor of the defendants, the plaintiffs appeal.

Affirmed.

W. E. Davies and J. E. Ebert, both of Marysville, for appellants.

Homer Lingenfelter, of Marysville, for respondents.

PER CURIAM.

This is an appeal by plaintiffs from a judgment entered in an action to recover damages for the flooding of their land. The verdict of the jury was for defendant J. J. Simpson.

In 1932 and 1933 plaintiffs and defendants were in possession of adjoining tracts of land in Yuba county. Plaintiffs held their property under a contract of purchase, a 40-acre tract which they had improved and were operating as a dairy farm. The adjoining tract of 500 acres, in possession of defendant J. J. Simpson, as lessee, was largely farmed to rice and was irrigated and flooded during the rice season with water imported from an outside source.

Plaintiffs charged that in August and September, 1932, and again in September, 1933, defendants "wilfully, negeligently and carelessly caused water to be diverted from their said land onto, overflowing and flooding the land of plaintiffs," and carelessly allowed the water to remain upon the land of plaintiffs for a period of about eight days until the same became stagnant, menacing the health of plaintiffs and their family, causing the air to become foul, dairy cows to become diseased from drinking stagnant water, crops to be destroyed, and other damage, in the sum of $5,475. They also prayed for an injunction to enjoin such flooding in future. Defendants set up in their answer as a special defense that their lands were inclosed by levees designed for the purpose of protecting plaintiffs' premises, and for keeping them from being flooded by water used in the growing of rice, but that plaintiffs had made various cuts and openings in said levees before any flooding of plaintiffs' lands and obtained water therefrom without the knowledge or consent of defendants, and that plaintiffs were so negligent in the maintenance, operation, and control of the cuts and openings that their lands were flooded.

The lease of defendant J. J. Simpson was not renewed in 1934, and therefore the issue of injunction was dispensed with. Plaintiffs dismissed the action against all defendants except J. J. Simpson, and the case went to the jury on the question of liability for damages alone. After denial of their motion for a new trial, plaintiffs prosecuted this appeal.

The evidence was conflicting as to the cause of the overflowing of the rice water in 1932. In that year defendant had a border check, or levee, along the southern border of his land, which lay to the north of plaintiffs' land, this levee being between the two properties, it having been constructed by defendant to prevent water from flowing onto plaintiffs' land during the time defendant was draining the rice lands. The evidence showed that during this year, and at various times prior to the release of the rice waters by defendant, plaintiff Karl Rozewski cut holes in this border check and took water from defendants' land onto his own for the purpose of irrigating his lands. One of defendant's sons testified: "In 1932, we was draining the water off the rice field to let the rice get a start and that is when he (Karl Rozewski) came and asked me if he could have some of that water because his ditch wasn't fixed to get water and if he could take that water he wouldn't have to pay for it." This witness told plaintiff he could have such water as he needed, as it was only spill water anyway. Defendant produced evidence to show such damage as resulted in this year was caused by water flowing onto plaintiffs' land by the openings plaintiff Karl Rozewski had made. One witness testified that in 1932 a little water might have got on plaintiffs' land from the draining but that it was not enough "to hurt anything," and also that Karl Rozewski did not complain to defendants about any water getting onto his land in 1932 from the draining, but that Karl Rozewski told him "he needed the water anyway; it didn't make any difference." There was also testimony showing that some of the damage alleged by plaintiffs to have been caused by the draining in 1932 was caused by plaintiffs' acts in irrigating his own land and the water remaining thereon too long, due to the ground being low, and surrounded by high ground.

As to the flooding in 1933, it was shown that defendant caused to be erected a solid, substantial levee, about 4 feet high, between his land and plaintiffs', to keep the water from flowing upon the land of the latter during the unwatering season; that plaintiff Karl Rozewski cut a large hole in this levee, at the northeast corner of his land, and took water through it from defendant's land onto his own, from time to time during the summer, and that later in the summer, and about the time defendant was preparing to drain his rice lands, this plaintiff installed a check box, with removable board, in the hole made by him in the levee in order to facilitate the release of water from defendant's land onto his own. It appeared that a highway ran along the east side of plaintiffs' land up through and intersecting that of defendant, and that on each side of this highway there was a drainage ditch through which, it appears, both parties had the right to drain water from their land. Defendants drained their rice land immediately to the north of plaintiffs' land without any water getting onto plaintiffs' land, the board being in place in the check box during this time. It was shown that defendants spent a much longer time draining this parcel of land than would have been necessary ordinarily, because the drainage ditches on either side of the highway were grown up with weeds and tule, and would permit only the flow of a limited amount of water at a time. It also appeared that a day or so before Labor Day of 1933, defendants, having finished the draining of the land immediately to the north of plaintiff, began to drain their rice land on the east side of the highway, to the north of plaintiffs' land; that, before so doing, they inspected their levee thoroughly, saw that the check box belonging to plaintiffs had its board in place, and closed and sealed the box with mud to insure its safety; that during the night of Labor Day some one (the record does not disclose who it was) removed the protecting board from the check box and in the morning plaintiffs' land was covered with water. The water from the northeast of plaintiffs' land where defendant was draining his rice was running into the ditch on the east side of the highway, through a pipe under the highway to the west, and thence through the hole made in the check box by the removal of the board. Plaintiffs testified that the night before the flooding at about 5 o'clock they saw the water coming upon their land from the direction of the check box, but they did nothing to stop it, and the record does not show whether or not there was much, if anything, they could do to stop it. However, the following morning, when his land was covered with water, Karl Rozewski sent for some employees of the company from which he was purchasing the land and they plugged up the pipes running under the highway on the west; this was done, apparently, to prevent more water coming from the rice lands into the ditch on the west side of the highway, but it appears that the plugging of the pipes caused the water to back up on plaintiffs' land and to stand there for four or five days, becoming stagnant and thus increasing the damage to plaintiffs' land. As to this, one of the sons of defendant, who was in charge of the draining, testified:

"Q. Now, after the day when Rozewski's property was wet, was there any interference with the drain underneath the highway? A. Yes, Mr. Lucas sent some men up there and plugged it up so there couldn't no water come through.

"Q. What effect did that have on keeping the water running off Rozewski's place? A. That stopped it. It had to stand there and wait until the plugs were pulled.

"Q. That was due to the fact that the Farm Land Investment Company plugged this pipe? A. Yes, sir. They left no escape for the water."

This witness further testified that he saw the water on Rozewski's land the next morning but that he thought it was there because Rozewski was using it to irrigate with, that he had done it before, and had that much water on his land. It also appears that, when defendants were informed that the water was flowing on plaintiffs' land by reason of the board being out, they took steps immediately to mitigate the damage, i. e., they adjusted their check boxes on the land they were draining to diminish the flow, and diverted as much of it as they could with safety in another direction, and thus relieved the flow in the drainage ditches. The facts also disclosed that the ditches were owned by the water district; that defendants had requested the directors of such district to clean out the ditches, but that they had not done so; it was further shown that the defendants had followed the practice, while draining their lands, of regulating the flow of water into the ditches so that no more water than the ditches could carry off was allowed to flow into them at one time, considering the growth of weeds and tule therein. At least two witnesses testified that the flooding in 1933 could not have occurred had the protecting levee of defendant not been cut and the water box installed therein; that the only way the water could have flowed onto plaintiffs' land was through the check box.

[1] Upon this evidence, in some particulars of which there was a sharp conflict, the jury returned their verdict in favor of the defendant J. J. Simpson. But plaintiffs contend that defendant was liable on the theory that the person who for his own purposes brings on his lands and collects there anything likely to do mischief keeps it at his peril, and, if it escapes is prima facie liable for any damages which are a natural consequence of its escape. Fletcher v. Rylands, 3 H. L. 330. We do not find it necessary to now determine whether or not the doctrine of Fletcher v. Rylands is applicable in this state. The doctrine was apparently repudiated in the case of Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766, in reference to a factual situation somewhat similar to the case here involved; it was apparently followed in the cases of Parker v. Larsen, 86 Cal. 236, 24 P. 989, 21 Am.St.Rep. 30; Kall v. Carruthers, 59 Cal.App. 555, 211 P. 43; Nola v. Orlando, 119 Cal.App. 518, 6 P.(2d) 984; and in the late case of Green v. Gen. Petroleum Co., 205 Cal. 328, 270 P. 952, 60 A.L.R. 475, the doctrine of Fletcher v. Rylands was apparently approved. See, generally, 17 Cal.L.Rev. 188; 20 Cal.L.Rev. 665; 5 So.Cal.L.Rev. 263–272; 2 So.Cal.L.Rev. 90. However, in the present case, whether the defendant's liability is that of an insurer or whether it is predicated upon negligence is immaterial, for the reason that the evidence is clearly susceptible of the interpretation that the injury was caused solely and exclusively by the acts of the plaintiffs themselves. Here it is shown that plaintiffs' land would not have been flooded but for their own acts in cutting holes in defendant's levees and installing the check box in one of the openings. The levee having been erected by defendant for the sole purpose of protecting plaintiffs' land from the overflowing of the water and plaintiffs having installed the check box and used it more or less continuously during the irrigating season to take waters from defendant's land, it was their duty to see that the board was in place at all times other than those occasions upon which it was removed from the box by plaintiffs themselves for irrigat-

ing their own land. It seems clear that the proximate and immediate cause of the flooding of plaintiffs' land and its consequent injury was not the impounding of the rice water upon defendant's land by him, or the manner of its maintenance or use, but was the escape of the water through the box which plaintiffs had installed for their own use and benefit. By installing the check box on defendant's levee and making use of the impounded waters, plaintiffs must be deemed to have relieved defendant of any liability he theretofore owed them as an insurer.

[2] Plaintiffs also complain of the giving of two instructions on the theory of negligence. While these instructions are not compatible with the theory of absolute liability upon which plaintiffs rely, they were not improper on the theory of negligence. Furthermore, instructions were given on the doctrine of absolute liability. Considering all of the instructions, as a whole, they were manifestly fair to plaintiffs and they cannot complain now that the jury has found against them upon issues framed by themselves, that these two instructions on negligence should not have been given.

The jury having found in favor of defendant upon conflicting evidence, and there being substantial evidence in the record to sustain such finding, the judgment is affirmed.

---

22 Cal.App.2d 87

SOUTHERN PAC. CO. v. FELLOWS et al.

Civ. 11219.

District Court of Appeal, Second District, Division 1, California.

July 20, 1937.

Rehearing Denied Aug. 17, 1937.

Hearing Denied by Supreme Court Sept. 16, 1937.

1. Indemnity 🔑8

A clause in contract whereby contractor agreed to indemnify railroad company from and against "any and all claims, loss, damage, injury and liability howsoever the same may be caused, resulting directly or indirectly from work covered" by contract, indemnified railroad against liability caused by railroad's own negligence.

2. Indemnity 🔑6

In construing indemnity clause of construction contract, District Court of Appeals would be governed by facts and surrounding circumstances.

3. Indemnity 🔑8

An injury to contractor's employee who came in contact with electric trolley wires which were jointly used by railroad and contractor building addition to railroad's erecting shop resulted indirectly from construction work within clause in construction contract indemnifying railroad from and against any and all claims, loss, damage, injury and liability howsoever the same might be caused, resulting directly or indirectly from construction work.

◆

Appeal from Superior Court, Los Angeles County; Warren Steel, Judge.

Action by the Southern Pacific Company, a corporation, against C. A. Fellows, an individual, and the United Fidelity & Guaranty Company, a corporation. From a judgment for the defendants, the plaintiff appeals.

Reversed.

W. I. Gilbert, of Los Angeles, for appellant.

H. C. Johnston, of Los Angeles, for respondent Fellows.

Mills, Hunter & Dunn, of Los Angeles, for respondent corporation.

YORK, Justice.

The facts upon which appellant railroad company bases its claim to recover upon an indemnity agreement, and a surety bond executed pursuant thereto by respondent Fellows, as principal, and respondent corporation, as surety, are contained in a stipulation of facts set out in the bill of exceptions herein. It is there shown, among other things, that on December 6, 1923, appellant railroad company and respondent Fellows, as contractor, entered into a contract by which the latter undertook the construction of a locomotive erecting shop for the railroad company. In addition to a provision requiring respondent contractor to furnish a surety bond insuring the faithful performance of his contract, the said contract contained an indemnity clause to the following effect: "Sec. 21. Contractor expressly agrees to indemnify and save Railroad harmless from and against any and all claims, loss, damage, injury and laibility howsoever same may be caused, resulting directly or indirectly from work covered by this agreement."

During the course of construction of said building, one L. T. McCready, an employee of respondent contractor, was injured, and in an action which he thereafter brought against the railroad company in the United States District Court for the Southern District of California (Southern Pacific Co. v. McCready, 47 F. (2d) 673), he recovered judgment, in full satisfaction of which the appellant railroad company paid to him on November 2, 1931, the sum of $33,543.25. By the instant action appellant seeks to recover upon the surety bond, above mentioned, the amount of the judgment which it paid to McCready together with $2,303.21 expended by it in connection with the defense of the McCready action, a total of $35,848.46, with interest thereon from November 2, 1931, and costs of suit herein.

From a judgment in favor of defendants, railroad company takes this appeal and thereby presents to this court for decision the following question: "Does the indemnity agreement in question (to-wit, section 21 of the Construction Contract) indemnify the Southern Pacific Company against the consequences of its own negligence?" In other words, this court is called upon to construe the provisions of said section 21 and to decide whether or not it is comprehensive enough to indemnify railroad company for an injury caused by its own negligence.

It appears from the stipulation of facts hereinbefore referred to that the said injury occurred in the manner following, to wit: The building under construction was approximately 400 feet long, 75 feet wide, and with side walls 25 feet high. On August 18, 1924, the date upon which the injury was sustained, one-half of the building was completed and in use by railroad company, and respondent contractor was engaged in completing the remainder thereof. In the completed portion, railroad company had installed and was operating two electric cranes suspended from an I-beam 15 or 16 inches wide, on the top of which was set a rail on which ran the wheels of the crane. At the side of the I-beam and slightly below the top of it railroad company had installed and supported by means of a bracket three uninsulated trolley wires, carrying 450 volts of electricity and furnishing power to the cranes. The beam and trolley wires ran the entire length of the building, and the beam had been constructed in the unfinished portion thereof and the trolley wires installed there by the railroad company. However, no power had been turned on in the trolley wires extending into the incompleted portion of the building until two or three days before August 18, 1924, when a splice of the trolley wires was made between the finished and the unfinished portions by railroad company's employees and the current turned on by them throughout the length of the entire building, including both the finished and the unfinished portions. At this time railroad company's employees put up signs marked "High Voltage—Danger." During this period the I-beam and rail to the incompleted portion of the building had a scaffolding fastened to it by means of cleats around it from a cross-beam which rested on top of the I-beam. Prior to August 18th approximately 100 feet of the scaffolding, beginning with the end of the finished portion of the building and running for said length into the unfinished portion thereof, had been removed, and railroad company was operating two cranes upon the I-beam and trolley wires extending into the unfinished portion of the building as far as the scaffolding had been removed, to wit, about 100 feet. These two cranes were being operated on said 100 feet for the purpose of hauling mortar, boxes, cement, and rails for the respondent contractor, and some boilers and parts of engines had been moved and placed in the incompleted unit. On the morning of August 18, 1924, L. T. McCready was instructed by his superior, who was in the employ of respondent contractor, to go upon said beam and to remove a certain 2x8 plank, one end of which rested upon and was fastened by cleats to said beam; this work was done in connection with the further removal of the scaffolding around the said I-beam. In order to remove the braces, it was necessary for McCready to sit on the I-beam astraddle of the rail with the rail between his feet and to use a pinch bar to take off the cleats. After removing the cleats McCready held the cross-bar to keep it from moving in either direction stooping over and holding the top of the cross-bar to keep it from falling. It would then be lowered by means of a rope tied to it, the rope running over the I-beam. McCready was assisted by three other men.

It also appears from said stipulation of facts that before starting to work to remove said scaffolding McCready knew the wires running along the side of the I-beam were charged with electricity, knew that railroad company had refused to cut the current, and understood the danger of coming into contact with electric wires and had been warned of such danger; that two or three days prior to August 17th the construction foreman for respondent Fellows had complained to one Franklin, the representative of railroad company in the construction of the building, and had asked him to deaden or shut off the current in the trolley wires running through the unfinished portion of the building, stating that he was going to send his men to take down the scaffolding around the wires and he was afraid they might be hurt. Franklin refused to deaden the wires or to cut off the current. On the said 18th day of August, 1924, while McCready was on the I-beam in the manner hereinabove set forth, the upright to which the other end of the plank was attached suddenly and unexpectedly slipped and McCready was thrown from his balance and, falling came into contact with the trolley wires charged with electricity, thereby suffering the loss of a part of his left hand and crippling the remainder of his hand.

[1-3] From the foregoing résumé, it is quite apparent that the injury to the workman McCready resulted at least "indirectly from work covered by this agreement," if not directly. While it is true that the trolley wires which furnished power to the cranes were under the control of appellant railroad company, the cranes were being operated in the incompleted portion of the building for the purpose of hauling mortar, boxes, cement, and rails for respondent contractor. Also, these cranes were being used in the completed portion of the building by railroad company. In other words, there was a joint use by both parties of the building under construction and of the cranes. Since the record shows that the building being constructed was an addition to railroad company's erecting shop, we believe such joint use was clearly within the contemplation of both parties at the time the contract was entered into.

The indemnity clause in the contract, undertaking, as it does, to indemnify railroad company from and against "*any and all* claims, loss, damage, *injury and liability howsoever the same may be caused, resulting directly or indirectly from work* covered by this agreement," is so sweeping and all-embracing in its terms that, although it does not contain an express stipulation indemnifying appellant against liability caused by its own negligence, it accomplishes the same purpose. (Italics ours.)

Many cases are cited by both parties in support of their respective convictions as to the interpretation of the clause in question. In none of them is the situation quite the same as that presented by the facts before us, and it is our belief that, in construing this indemnity clause and interpreting its meaning, we should be governed by the facts and the surrounding circumstances.

The case of Buckeye Cotton Oil Co. v. Louisville & N. R. Co. (C.C.A.) 24 F.(2d) 347, is helpful. That is a case which involves an indemnity clause under which the oil company agreed to hold the railroad company "harmless from the claims and *demands of any and all persons on account of any damages or injuries caused directly or indirectly by the existence,* location, or condition of any structure or obstruction of any kind" on the premises of the oil company or by any obstruction on the tracks of the railroad company. (Italics ours.) A scaffold was erected by oil company over two of the tracks, and, while railroad company was switching cars on one of these tracks, a car struck the scaffold, causing it to fall and injure a workman; the workman sued the railroad company and recovered, whereupon railroad brought suit under the clause above referred to and was permitted to recover, the court stating: "If * * * this structure or obstruction was an indirect cause of the injury, indemnity is given; and, as we have stated, under an interpretation of the evidence most favorable to defendant, it seems clear to us that the support was close enough to the track to involve some danger—a danger, we think, that reasonably might have been expected to result from the ordinary handling of cars. * * * We think an operating condition such as that, though involving some negligence on the part of the crew in moving the car, was within the indemnity contemplated by the contract."

The judgment is reversed.

We concur: HOUSER, P. J.; DORAN, J.

22 Cal App.2d 363

BEST v. SMITH, Judge.

Civ. 11432.

District Court of Appeal, Second District, Division 1, California.

Aug. 19, 1937.

1. Appeal and error 🔑622

The trial court was not entitled to object to certification of transcript on appeal on ground that no request therefor was filed with clerk within ten days after service and filing of notice of appeal as required by statute, where no written notice of entry of judgment was ever served upon appellant, since the time had not started to run (Code Civ.Proc. § 953d, and § 953a as amended by St.1935, p. 1960).

2. Appeal and error 🔑348(1)

The filing of notice of appeal does not constitute a waiver of notice of entry of judgment.

3. Appeal and error 🔑533(1)

The opinion of the trial judge is not a part of the record on appeal.

4. Appeal and error 🔑612(2)

The trial court has no authority to certify to the clerk's transcript.

5. Mandamus 🔑57(1)

Mandamus would not lie to compel judge of the superior court to settle a transcript on appeal where it appeared that the clerk of the court had already certified to a judgment roll containing everything asked for by petitioner.

◆

Mandamus proceeding by Cora A. Best against Lewis Howell Smith as Judge of the Superior Court in and for Los Angeles County. On hearing after return to an alternative writ of mandate.

Petition for writ of mandate denied and alternative writ of mandate discharged.

Edwin F. Franke, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and William E. Lamoreaux, Deputy Co. Counsel, both of Los Angeles, for respondent.

YORK, Justice.

[1, 2] This matter comes before us upon a hearing after return was made to an alternative writ of mandate, which writ required respondent to settle or to show cause why he had not settled the transcript on appeal in the case of Best v. Clark, No. D–145,080, superior court of Los Angeles county. Among the objections urged to the certification of the transcript on appeal was that no request for the same was filed with the clerk within ten days after service and filing of the notice of appeal, as required by section 953a, Code of Civil Procedure (as amended by St.1935, p. 1960). This objection is without merit, for the reason that no written notice of the entry of judgment was ever served upon petitioner, as is required by section 953d of the Code of Civil Procedure; and further, because the filing of the notice of appeal does not constitute a waiver of notice of the entry of the judgment. Sterling Corporation v. Superior Court, 207 Cal. 370, 371, 278 P. 859; Griffin v. Kent, 206 Cal. 263, 274 P. 56; Smith v. Wall, 97 Cal. App. 674, 275 P. 983; Attkisson v. Reynolds, 94 Cal.App. 185, 270 P. 686. Therefore the time has not as yet started to run.

[3-5] The answer to the petition for the writ of mandate herein shows that the clerk of the superior court has already certified to a judgment roll containing everything asked for by petitioner in her request for transcript, not even excluding the opinion of the trial judge. The opinion of the trial judge is not a part of the record on appeal. Estate of Finkler, 7 Cal.(2d) 97, 59 P.(2d) 801; McLeod v. McMahon, 14 Cal.App.(2d) 565, 58 P.(2d) 699. It therefore appears that there is nothing for the trial court to settle, as he has no authority to certify to the clerk's transcript. Beck v. Barnes, 129 Cal.App. 187, at page 190, 18 P.(2d) 749. In the circumstances

here shown, the alternative writ should not have been granted.

The petition for writ of mandate is denied, and the alternative writ of mandate is discharged.

I concur: DORAN, J.

HOUSER, P. J., does not participate in the foregoing decision.

22 Cal.App.2d 402

SALAZAR v. STEELMAN.

Civ. 11303.

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1937.

Rehearing Denied Sept. 22, 1937.

1. Judgment 🔑390

An affidavit by a lawyer who was a regular employee of plaintiff's attorney and was especially delegated to handle plaintiff's case was properly filed in support of motion to relieve plaintiff from judgment allegedly obtained through mistake, notwithstanding statute construed as requiring that affidavit be made by party or his legal representative (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

2. Judgment 🔑363

To authorize vacation of judgment, facts shown by applicant must constitute mistake, inadvertence, surprise, or excusable neglect as matter of law, and erroneous reliance on reasons which would merely constitute everyday excuse for suffering judgment to be rendered will not suffice (Code Civ.Proc. § 473, as amended by St. 1933, p. 1851).

3. Judgment 🔑364

That title company advised plaintiff in action on note that such action should be dismissed before "foreclosing" trust deed securing note, and that plaintiff did not know that new trial could be had in action on note after favorable judgment had been reversed on appeal, would not authorize vacation of judgment for defendant, entered after dismissal by plaintiff, on statutory ground of mistake (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

4. Appeal and error 🔑931(4)
Judgment 🔑363

Where plaintiff dismissed action on note, and, after entry of judgment for defendant, instituted new action to foreclose security for note, order vacating judgment for defendant on grounds stated in affidavit, that plaintiff's acting attorney did not know that prior trust deed had been foreclosed or that security for plaintiff's note was valueless, was not an abuse of discretion and order would not be disturbed by reviewing court though it was also based on other erroneous grounds and evidence tended to contradict statements in affidavit, since order implied finding that such statements were true (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

5. Judgment 🔑392

Vacating judgment on ground of mistake was not an abuse of discretion where facts would support either inference that movant used no legal diligence in presenting motion for vacation of judgment, or inference that movant discovered mistake shortly before making motion (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Dolores Salazar against Samuel Steelman. From an order vacating judgment for defendant, defendant appeals.

Affirmed.

William B. Ogden, of Los Angeles, for appellant.

Roger Marchetti, of Los Angeles (Charles A. Winter, of Los Angeles, of counsel), for respondent.

HOUSER, Presiding Justice.

A trust deed that was security for an indebtedness owed by defendant to some person other than plaintiff having been "foreclosed," plaintiff instituted an action to recover a judgment against defendant on a promissory note that was owned by plaintiff, the payment of which purportedly having been secured by a second trust deed upon the same property that theretofore had been sold on the "foreclosure" of the first indebtedness. A judgment that was rendered in that action in favor of the plaintiff was reversed on appeal. Thereupon, plaintiff caused to be entered her dismissal of the action. About six weeks thereafter, plaintiff commenced a "new" action against defendant, which was based upon the same facts that had been alleged in the first action, and in which "new" action the same relief was sought that had been sought in the first action. To the complaint in the "new" action an answer was filed, wherein, among other defenses, the statute of limitations was pleaded. On the last day of a six-month period which followed the entry of judgment on the dismissal of the action, plaintiff gave to defendant a written notice of motion that application would be made to the trial court for an order which, if made, would have the effect of vacating the judgment that was rendered in the first action. On the hearing of said motion, the trial court granted the same, and thereupon made its order by which the said judgment was vacated. It is from that order that the instant appeal is prosecuted.

The motion was made under that part of section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851, which, in substance, provides that "the court may * * * relieve a party or his legal representative from a judgment, order, * * * taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief * * * must be made within a reasonable time, in no case exceeding six months, after such judgment * * * was taken."

The decisive question that is here at issue is whether in making its order by which the judgment in the first action was vacated, the trial court abused its discretion.

In the presentation of her motion, plaintiff relied upon an affidavit that was made by one Fowler, who was employed as an attorney by the "legal representative" of plaintiff. A copy of that affidavit is as follows:

"Gethin T. Fowler, being first duly sworn, deposes and says:

"That he is an attorney at law and is now and has been employed in the law offices of Roger Marchetti, attorney for the plaintiff in the above entitled action.

"That in April, 1936, affiant went to the Title Guaranty Company for and on behalf of the said Roger Marchetti for the purpose of employing the Title Guaranty Company to handle the foreclosure of the trust deed involved in the above entitled action.

"That the Title Guaranty Company made a preliminary search of the records involving the real property covered by the said trust deed and instructed affiant that it would be necessary to dismiss the above entitled action before they could proceed with the foreclosure and sale of the said real property. That affiant caused a dismissal without prejudice to be filed and at said time affiant did not know that the property had already been sold under a prior trust deed and affiant did not know that there was any other trust deed covering the said real property.

"That unless the judgment of dismissal be vacated and set aside the statute of limitations will have run against the promissory note involved in the said action and the plaintiff will have no remedy or means of collecting the unpaid balance on said promissory note.

"That affiant relied upon the advice of the Title Guaranty Company and would not have caused the said dismissal to be filed without the advice of the said Title Guaranty Company.

"That said promissory note was executed on the 12th day of May, 1930, and was made payable in one year from said date. That the above action was filed on the 22d day of June, 1931; judgment was entered against the defendant on the 27th day of July, 1932; the defendant thereafter appealed to the District Court of Appeal and a judgment of reversal was made by said court on the 18th day of February, 1935. Judgment was certified by the clerk of the District Court of Appeal on the 20th day of April, 1935, and the remittitur was stamped filed by the county clerk's office, county of Los Angeles, state of California, on the 26th day of April, 1935. On May 20, 1935, said judgment of reversal was entered and docketed by the said county clerk's office.

"That affiant was not aware of the previous history of the case at the time he applied to the Title Company as above stated in respect to information and advice as to the foreclosure of the second trust deed which was given to secure the said note and was not aware of the right of the plaintiff to proceed with a new trial of said action, and according to his information was under the impression that the only remedy left open to the plaintiff was to go through a foreclosure of her trust deed, but in order to prosecute such foreclosure it was necessary, according to the advice of the said Title Company, that said action should first be dismissed, but that if affiant had known that a new trial of said action could have been had under said judgment of reversal it would not have been necessary to prosecute a foreclosure under said trust deed for the reason that said property had already been foreclosed under a prior trust deed and in consequence thereof said second trust deed no longer constituted a lien on said premises and was incapable of being foreclosed and it was through said misapprehension, mistake and inadvertence that said dismissal was filed and this affidavit is made in support of an application to vacate said judgment of dismissal in order that the plaintiff may proceed with a new trial of said cause under said judgment of reversal.

"That under said judgment of reversal of the District Court of Appeal, according to section 355 of the Code of Civil Procedure, the plaintiff had one year after the entry and docketing of said judgment of reversal on May 20, 1935, in which to bring a new action on said note and pursuant thereto plaintiff did bring an action within one year after the entry and docketing of said judgment of reversal and said action is now pending.

"That the defendant has interposed an answer to the complaint in said action but said action has not yet been set for trial.

"That in said answer to said second action on said note now pending as above stated the defendant claims that said second action was not brought within the time required by said last named section of the Code of Civil Procedure, the defendant claiming in said answer that the period of one year within which to bring said action should therefore have been brought on or before April 20, 1936, whereas said second action was not brought until May 20, 1936, and that if the contention of the said defendant as set up in said answer should prevail and said second action should therefore be dismissed the plaintiff would be without remedy unless she were permitted to prosecute her claim in said first action above described and for the reason that said judgment of dismissal of said action is now of record in the court she cannot prosecute a trial of said first action unless such judgment of dismissal is vacated.

"That had the true facts of the situation been fully known and comprehended by affiant he would not have followed the mistaken advice given by said Title Company and that owing to said misapprehension, improper advice, inadvertence, mistake and surprise it is desired that said judgment of dismissal be vacated."

[1] At the outset, it should be noted that the affidavit, within which the facts were stated, was made not by either plaintiff or by her "legal representative," but that it was made by one who was in the employ of plaintiff's "legal representative." Ordinarily, as far as the strict permissive language of the statute permits, the affiant was a "rank outsider"; consequently, his statements, with reference to his position in the matter, would be inadmissible and wholly irrelevant for the purpose of establishing the required ultimate fact of "mistake, inadvertence, surprise, or excusable neglect" of the "party or his legal representative." Bruskey v. Bruskey, 4 Cal.App.(2d) 472, 41 P.(2d) 203. Were it not for the fact that Fowler is an attorney; that at all times here in question he was the accredited employee of plaintiff's "legal representative"; and that in the instant matter he had been delegated by the "legal representative" to act in the capacity in which he did, no reason would be apparent for giving any consideration to Fowler's affidavit. But since the fact appears that all of Fowler's acts were done as a specially delegated agent of plaintiff's "legal representative," it is concluded that within the meaning and intent of the language of the statute, Fowler's affidavit should be accepted and acted upon in the same way, and be accorded the same weight, as though the affidavit had been made by either "the party or his legal representative" in person.

[2] But it is not enough that in themselves the several reasons that were stated in the affidavit might be considered by a layman as a sufficient everyday excuse for the plaintiff in directing a dismissal of the first action. A legal compliance with the demands of the statute cannot thus be made to appear. To the contrary, the showing that must be made by an applicant for relief such as was sought by plaintiff must legally constitute "mistake, inadvertence, surprise or excusable neglect." And in the instant matter, if the facts that were set forth in the affidavit to which attention hereinbefore has been directed fail to justify the necessary implied conclusion therefrom, that they in fact constituted mistake, inadvertence, surprise, or excusable neglect, as a matter of law, it must follow that the trial court abused its discretion in making the order in question.

On examination of the affidavit, it will appear, in substance, that its basic facts consist of three several statements, to wit: (1) That a title company advised affiant that it would be necessary that the first action be dismissed before "foreclosing" the trust deed which secured the note in question; (2) that affiant did not know that a new trial could be had in the instant action after the judgment of reversal in the appellate court had been rendered; (3) that affiant did not know that the prior trust deed had been "foreclosed" and that the security for the instant note was valueless.

[3] With reference to the first two of such "facts," it would seem clear that neither of them, nor both combined, could furnish a sufficient foundation for a conclusion that, within the meaning of either or any of the requirements that are specified in the statute, to wit, mistake, inadvertence, surprise, or excusable neglect, an order properly could be rested, by which the judgment in question would be vacated. Conceding that advice given by an accredited and competent legal assistant or officer of a title company with respect to correct legal precedure in matters that may affect situations of the kind that were present in the instant matter is usually reliable, nevertheless, it should be no more reliable than that which might be given by any competent attorney. And had the latter situation obtained herein, and had plaintiff suggested that fact as a sufficient reason for granting her motion for making an order by the court by which the judgment would be vacated, it is unlikely that the court would have seriously considered it. Nor does the second asserted fact that was suggested by the affiant, to the effect that he did not know that a new trial could be had in the instant action after judgment of reversal had been rendered in the appellate court, merit any different fate. Brooks v. Johnson, 122 Cal. 569, 572, 55 P. 423; Garroway v. Jennings, 189 Cal. 97, 99, 207 P. 554; Porter v. Anderson, 14 Cal.App. 716, 113 P. 345; Mahana v. Alexander, 88 Cal.App. 111, 130, 263 P. 260; Penryn Land Co. v. Akahori, 37 Cal. App. 14, 18, 173 P. 612.

[4] But with respect to the third reason that was assigned by the affiant, to wit, that affiant (as the "legal representative") did not know that the prior trust deed had been "foreclosed" and that the security for the respondent's note was valueless, the situation is different. Although, judging from various other facts that appear from an inspection of the files in the action, it readily might have been concluded by the trial court that affiant had actual knowledge of the "foreclosure" of the senior trust deed, nevertheless the determination of the question thus presented rested with the trial court; and since its order in the premises implies a finding in favor of the truth of affiant's declaration, this court has no authority to disturb it. And assuming that as a matter of fact neither plaintiff nor her legal representative had knowledge that the prior deed of trust had been "foreclosed," within the several legal definitions of what may constitute "mistake" or "inadvertence," the trial court was authorized to make the order in question. In that connection, the following legal definitions may be helpful: "A mistake, in a legal sense, may be defined to be the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done." Cummins v. Bulgin, 37 N.J. Eq. 476, 477; Davis v. Steuben School Tp., 19 Ind.App. 694, 50 N.E. 1, 5.

"Mistake," as used in section 274 of the Code of North Carolina, which provides that the judge may, in his discretion, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, "implies not simply any, but reasonable, mistake, * * * as to * * * some fact, or something that has or has not been done, of which the complaining party ought to have knowledge, and which, if he had had such knowledge, might have prevented the judgment, order, or other proceeding of which he complains." Skinner v. Terry, 107 N.C. 103, 12 S.E. 118, 119.

"A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done, or omitted. * * * It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence." Burton v. Am. Bonding & Trust Co., 182 Ky. 637, 206 S.W. 884, 886.

[5] It is next urged that the order was and is void for the reason that plaintiff's application to the superior court for relief was not made within a reasonable time. In that regard, an examination of the pertinent facts contained within the record would admit of a conclusion that plaintiff used no legal diligence in presenting her motion to the superior court. On the other hand, although not in direct answer to the charge of lack of diligence on the

part of plaintiff, it may be that the facts contained not only within the affidavit, but in the remainder of the record, warranted the inference that the date of discovery by plaintiff of the fact of prior "foreclosure" was so shortly before plaintiff made the motion to vacate the judgment that she could not fairly be charged with lack of diligence in that she had failed to present the motion within a reasonable time after the judgment was rendered. At any rate, in the circumstances, as a matter of law, this court is unable to declare that the implied finding by the trial court was entirely unsupported by the evidence; or, in other words, that in its final conclusion in the matter, the trial court abused its discretion.

For the reason that the other points suggested by appellant are impliedly decided adversely to his several contentions, it becomes unnecessary to devote special consideration to them.

The order appealed from is affirmed.

We concur: YORK, J.; DORAN, J.

---

22 Cal.App.2d 365

CHILDREN'S HOSPITAL SOC. OF LOS ANGELES et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

Civ. 11334.

District Court of Appeal, Second District, Division 1, California.

Aug. 20, 1937.

Hearing Denied by Supreme Court Oct. 18, 1937.

1. Workmen's compensation 🔑1340

Burden was on claimant to show right to compensation (Gen.Laws 1931, Act 4749, § 19(d).

2. Workmen's compensation 🔑1409

An award of compensation may not be based on surmise, conjecture, or speculation.

3. Workmen's compensation 🔑1357, 1939

Compensation awarded to nurse for "injury arising out of and occurring in course of employment" resulting from poliomyelitis was reversed for lack of evidentiary support, where no poliomyelitis cases, but only post-poliomyelitis cases, were treated in hospital and nurse sometimes left hospital, since no presumption that poliomyelitis was contracted in hospital could serve as substitute for reasonable inference founded on substantial evidence (Gen.Laws 1931, Act 4749, § 19(d).

[Ed. Note.—For other definitions of "Arising Out of Employment," "Course of Employment," and "Injury," see Words & Phrases.]

Proceeding under the Workmen's Compensation Act by Sarah Boulware, claimant, opposed by the Children's Hospital Society of Los Angeles, employer, and the Pacific Employers' Insurance Company. To review award of the Industrial Accident Commission of California, the Children's Hospital of Los Angeles and the Pacific Employers' Insurance Company bring certiorari.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioners.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondent Industrial Accident Commission.

Herlihy & Herlihy, of Los Angeles, for respondent Sarah Boulware.

DORAN, Justice.

This is a petition to review the findings and award made by the Industrial Accident Commission against petitioners, in favor of respondent Sarah Boulware.

After a hearing, the commission entered its findings, in substance, to the effect that Sarah Boulware, the applicant, while employed as a graduate nurse on and prior to January 1, 1936, at Los Angeles, by the Children's Hospital, had sustained injury arising out of and occurring in the course of her employment, in that she had contracted poliomyelitis, or infantile paralysis; and said commission awarded her certain compensation therefor.

It is contended by petitioners herein, in part, that "the commission acted without and in excess of its jurisdiction" and that there was no substantial evidence to support the finding; that on the contrary the evidence showed, without conflict, that the cause and source of the disease are unknown.

The evidence shows that Miss Boulware worked as a nurse at the Children's Hospital from July 10, 1934, to January 1, 1936, with the exception of the month of September, 1935, when she was absent on vacation. Although her choice of residence was optional, she lived in the dormitory near the hospital with other nurses and hospital workers. The dormitory consisted of the two upper floors of a building located on the corner of Vermont avenue and Sunset boulevard, in Los Angeles, the lower floor of which was occupied by stores. She worked from 10:30 p. m. to 7:00 a. m., with one night "off-duty" each week. Her activities were otherwise unrestricted.

The evidence further shows that the Children's Hospital did not treat contagious diseases of any character; that during Miss Boulware's employment at the Children's Hospital she neither treated nor came in contact with any case of poliomyelitis, nor is there any evidence that she came in contact with any other nurses, doctors, or hospital workers infected with the germs of such disease.

She testified, in substance, that she felt indisposed during the last three weeks of December; that about January 4th she consulted a physician who ordered her sent to the County Hospital. About January 5th her illness was diagnosed as poliomyelitis. She remained in the County Hospital in quarantine until January 27, 1936, at which time she was released.

Dr. George Parrish, health officer of the city of Los Angeles, appeared as a witness before the commission and testified at the hearing in July, 1936, in part as follows, about an epidemic of poliomyelitis in Los Angeles: "I have made a very close study of the outbreak, all the way from 1934 to the present time. The majority of all the cases of 1934 and 1935, under my order, as far as possible, were sent to the General Hospital, where we could have supervision, and I could see it." He testified, in substance, that 200 nurses at the General Hospital in 1934 contracted the disease. The epidemic reoccurred at the General Hospital in 1935, at which time about 50 nurses contracted the disease, and it was Dr. Parrish's opinion that some of the nurses who had been afflicted in 1934 and had recovered may have been "carriers" for an indefinite period and were responsible for the "flare-up," as he termed it, in the hospital in 1935. He testified further: "* * * we don't know how many carriers there are, and there is no way of finding out who are the carriers; and we know that that means a great many abortive cases. You know, your honor, only one case, 5 to 8, ever gets a paralysis at all, the other cases perhaps have only sniffles or cold, but they are poliomyelitis, and we have no way of knowing of these at all, we are perfectly helpless, up to the moment, of the control of this disease. * * * The average abortive case is one in which the symptoms are mild, and very short. So far as the individual knows, some little light cold, and disappeared in a day or two, and no further thought given to it. Unquestionably there are hundreds of those cases, who have a natural more or less immunity, and have no more than those few symptoms; and then they may run on indefinitely, spreading the disease to someone else." He testified further, in substance, that the contagious period of this disease is unknown. He also testified, for example: "We were so up in the air I brought the three outstanding men from Rockefeller Foundation here, Rockefeller paid the institution, sent them out here, and they worked through our health department, and they worked in every manner, but they themselves, up to the present moment haven't been able to determine the carriers, those still positive, and, in addition to that, we have Rosenau, from the Mayo's out here, and he did considerable work, but no one is able to find out more than we know ourselves. They have immunization serums that promised much, but so far we haven't gained much headway." It was further established by Dr. Parrish's testimony that the recognized period of quarantine for this disease is three weeks.

It is further shown, and not disputed by petitioners, that the Children's Hospital, during the period just prior to December 31, 1935, was treating ten or fifteen post-poliomyelitis cases, that is, patients who had recovered but who continued to suffer from the paralysis which accompanies the afflication and remains as an after-effect. This treatment consists of "pool, physiotherapy, baking and massage treatments." But there is no evidence that these patients were carriers of the disease.

Thus it will be seen that the record clearly establishes two facts: First, that very little, if anything, is known about poliomyelitis; and, second, that to conclude from the evidence adduced at the hearing that the alleged injury arose out of the employment, would be pure speculation.

Under the heading, "Position of the Commission," respondent commission submits the following: "The referee who heard the case and whose recommendations were confirmed by the commission discussed the case as follows: 'It seems to be more or less a question of fact as to whether or not there was any special exposure, or unusual exposure, to the disease; and each case appears to resolve itself upon its own merits. In this case, the writer believes that the law of averages would indicate that the disease was contracted at the hospital, for the following reasons: 1. There were two active cases in the hospital, one apparently for only a time of less than a day; 2. That there were, however, convalescent patients being treated, at the out-patient ward, by nurses who lived in the hospital under similar conditions with the claimant and with whom she must have had to come in more or less contact; 3. That the girl spent, according to her testimony, at least 90 per cent of her time at the hospital. On account of hours of work she very rarely went out, and then for only a short time. Under this set of facts, I believe there is a reasonable presumption that the disease was contracted at the hospital where work placed her, and that she is entitled to this presumption.' Respondent submits that the finding as made in Miss Boulware's favor is undeniably supported by evidence of a most substantial character, as set forth above."

Petitioners comment appropriately on the foregoing recommendations of the referee with the observation that: "It would, indeed, be a novel and disastrous principle if property rights could be divested on a gross assumption of 'the law of averages.'" Moreover, it might be further observed that under the circumstances no presumption can serve as a substitute for a reasonable inference founded on substantial evidence.

[1-3] The burden of proof was on the claimant for compensation. Workmen's Compensation Act, § 19 (d), Deering's Gen.Laws, Act 4749. An award of compensation may not be based upon surmise, conjecture, or speculation. William Simpson Construction Company v. Industrial Accident Commission, 74 Cal.App. 239, 240 P. 58.

There was a total lack of evidence to support the finding and award.

For the foregoing reasons the award is annulled.

We concur: HOUSER, P. J.; YORK, J.

---

22 Cal.App.2d 382

NELSON et al. v. SWEITZER et al.

Civ. 10507.

District Court of Appeal, First District, Division 2, California.

Aug. 24, 1937.

1. Appeal and error 🔑1170(10)

Alleged error in holding that decision of Supreme Court in related action was res judicata on issue of delivery of certain deeds was not prejudicial, where no additional proof on issue of delivery, such as would render Supreme Court's decision inapplicable, had been adduced (Const. art. 6, § 4½).

2. Appeal and error 🔑901, 1032(1)

Burden of showing that alleged error resulted in miscarriage of justice within terms of constitutional provision, as well as of showing error, is on appellant (Const. art. 6, § 4½).

3. Appeal and error 🔑996

The construction of evidence and inferences to be drawn therefrom are in trial court's discretion.

4. Tenancy in common 🔑15(10)

In action to quiet title, evidence *held* to authorize finding that wife who claimed title to husband's property under undelivered deed from husband, and remained in possession and management of property together with husband's sons by former marriage who owned half interest in property, did not by her conduct give sons notice of adverse character of her possession, since in absence of knowledge of alleged deeds and bill of sale, sons had right to believe that wife's possession was as cotenant.

5. Tenancy in common 🔑15(2)

The possession of one tenant is possession of all, and though intended as adverse, will be deemed to have been amicable in absence of acts calculated to give cotenants notice of hostile nature of tenant's possession.

Appeal from Superior Court, Kern County; Wm. Dehy, Judge.

Action to quiet title by Hans Nelson and others against Jesse Sweitzer, individually and as administrator of the respective estates of Sam Sweitzer, deceased, and of Emma Sweitzer, deceased, and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Borton, Petrini & Conron, of Bakersfield, Sven H. Svenson, of San Francisco, and Nelson & Ricks, of Eureka, for appellants.

Matthew S. Platz and J. R. Dorsey, both of Bakersfield, for respondents.

DOOLING, Justice pro tem.

This is an appeal by plaintiffs from a judgment for defendants in an action to quiet title.

Plaintiffs and appellants are blood relatives of Emma Sweitzer, and, as such, entitled to inherit her separate property. Respondents are the sons of Sam Sweitzer, husband of Emma Sweitzer by a former marriage, and Jesse Sweitzer, one of the sons, as administrator of the estates of Sam Sweitzer and Emma Sweitzer.

It appears from the record that Sam Sweitzer and Emma Sweitzer were married in 1898. Sam Sweitzer had four sons by a previous marriage, Jesse, Delbert, Harry, and Ralph, who are defendants and respondents herein. There were no children born of the marriage of Sam and Emma Sweitzer, and Emma Sweitzer died without issue. Sam Sweitzer died in 1916, leaving Emma and his sons surviving him. He left community property of himself and his wife Emma consisting of real and personal property. Shortly before his death Sam Sweitzer executed two deeds and a bill of sale purporting to convey all of this property to his wife, Emma. After his death in 1916, Emma recorded the deeds and bill of sale and continued in possession and management of all of the properties, applying the income to pay off existing mortgages and for her living expenses and keeping the balance until the time of her death in 1930. The relations between Emma Sweitzer and her stepsons were at all times cordial and friendly, they calling her "ma" or "Ma Sweitzer." One son, Jesse, lived in the same locality and saw her frequently on the most intimate terms. Another son, Ralph, spent most of his time in the United States Army, but between enlistments lived on the home ranch with his stepmother and always considered it his home. None of the sons of Jesse Sweitzer ever objected to their stepmother's occupancy and management of the property or to her keeping all of the income therefrom. It is in evidence that Emma Sweitzer made statements to several persons that all of the property was her own, but the only evidence that any of the sons ever heard of this claim came from one witness, who stated that she told Jesse Sweitzer of Emma Sweitzer's claim to exclusive ownership of the property. This Jesse Sweitzer denied. Shortly after Sam Sweitzer's death, Emma Sweitzer recorded the deeds and bill of sale, but there was no proof of actual knowledge of their existence or recordation by any of the sons, and we are entitled to assume in support of the judgment that the sons of Sam Sweitzer had no actual notice of the deeds and bill of sale nor of Emma Sweitzer's claim to exclusive ownership under them. The estate of Sam Sweitzer was not probated until after Emma Sweitzer's death.

After Emma Sweitzer's death, petitions for letters of administration on her estate were filed by Bank of America of California as nominee of two of the appellants herein, and by Jesse Sweitzer. From the appointment of the Bank of America of California as administrator of the estate of Emma Sweitzer, Jesse Sweitzer appealed and the order was reversed by the Supreme Court. Estate of Sweitzer, 215 Cal. 489, 11 P.(2d) 633. Following this reversal, Jesse Sweitzer was appointed administrator of the estate of Emma Sweitzer by the probate court.

In Estate of Sweitzer, supra, the Supreme Court held that under the evidence introduced on the hearing for letters of administration there was no delivery of the deeds and bill of sale from Sam Sweitzer to Emma Sweitzer, that as to the one-half which Emma Sweitzer took as community property there could be no adverse possession against the sons of Sam Sweitzer, and hence they were entitled to inherit at least that one-half from Emma Sweitzer (subdivision 8, § 1386, Civil Code as it read in 1930), and Jesse Sweitzer was entitled to letters of administration over the nominee of the brother and sister of Emma

Sweitzer under section 1365 of the Code of Civil Procedure, now Probate Code, § 422. As to one-half which descended to the sons of Sam Sweitzer on his death, the Supreme Court in Estate of Sweitzer, supra, left open the question whether Emma Sweitzer had acquired adverse title against the sons.

Upon the trial of this action, appellants again offered the deeds and bill of sale from Sam to Emma Sweitzer. Respondents objected on the ground that under Estate of Sweitzer, supra, the fact of nondelivery of these instruments was res adjudicata, which objection was sustained. Later the documents were admitted for the limited purpose of attempting to establish adverse possession under color of title.

[1, 2] Appellants urge on this appeal that the court erred in holding that the decision of the Supreme Court was res adjudicata in this action. Appellants support this claim with arguments and authorities of considerable force, but we find it unnecessary to decide the question, for the reason that the error, if it was error, is not shown by the record to have been prejudicial. Under article 6, § 4½, of our Constitution it is settled that the burden is on an appellant to show that the error, if one was committed, has resulted in a miscarriage of justice. Coleman v. Farwell, 206 Cal. 740, 276 P. 335; 2 Cal.Jur. pp. 1007-1009. Whether or not the decision in Estate of Sweitzer, supra, is res adjudicata in this action, it is at least a binding authority unless overruled that under the evidence introduced on the hearing for letters of administration there under review a finding of delivery could not be supported. Counsel for appellants made no offer of proof of any other or different facts touching the matter of delivery in the trial of this case. Since the burden is on appellant to show prejudice as well as error, and in the absence of proof additional to or different from that introduced on the question of delivery on the previous hearing, the trial court would have been bound to follow the rule laid down in Estate of Sweitzer, supra, on the question of delivery, we cannot see under the record made how appellants were prejudiced by this ruling.

[3-5] Appellants' chief argument is directed against the finding that Emma Sweitzer did not acquire title by adverse possession. They cite Feliz v. Feliz, 105 Cal. 1, 38 P. 521; Akley v. Bassett, 189 Cal. 625, 209 P. 576, and other cases, and contend that under the authority of those decisions, at least as to the one-half descending to the sons on Sam Sweitzer's death, Emma Sweitzer must be held to have acquired adverse possession as a matter of law. We do not consider those decisions controlling under the case made. Undoubtedly, under those decisions the evidence would have supported a finding of title in Emma Sweitzer by adverse possession. But the construction of the evidence and the inferences to be drawn therefrom were in the discretion of the trial court. The trial court was entitled to find that none of the sons had actual knowledge of the existence of the deeds and bill of sale from Sam to Emma Sweitzer or of her claim to exclusive title under them. From the friendly relations existing between the sons and their stepmother and the evidence as a whole, it was not unreasonable for the trial court to conclude that believing one-half the property to be theirs the sons allowed their stepmother, as their tenant in common, to occupy and manage it and take the profits therefrom during her lifetime. The possession of one cotenant is the possession of all, and cannot become adverse in the absence of acts calculated to bring home to the cotenants that the occupancy of their cotenant is under a claim of exclusive right to possession, and hostile to their title. Faubel v. McFarland, 144 Cal. 717, 78 P. 261. "Until the tenant has notice 'either actual or constructive, in some form, that the possession of his cotenant has become hostile, it will be deemed in law to have been amicable, notwithstanding the tenant in possession may, in fact, have been holding adversely.'" 1 Cal.Jur., p. 544, and cases cited.

Emma Sweitzer became a cotenant with her stepsons upon the death of Sam Sweitzer. In the absence of knowledge of the purported deeds and bill of sale, they were not only entitled to believe, but from the findings of the court did believe, that her possession was as such cotenant. The evidence supports the finding that nothing in the conduct of Emma Sweitzer was sufficient to or did bring home to respondents notice, actual or constructive, of the fact that her occupancy and use of the entire property of the cotenancy was adverse, rather than permissive.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, Acting P. J.

22 Cal.App.2d 375

SAN MATEO COUNTY v. CHRISTEN et al.

Civ. 10353.

District Court of Appeal, First District, Division 2, California.

Aug. 23, 1937.

Hearing Denied by Supreme Court Oct. 21, 1937.

1. Evidence 🔑19

It is common knowledge that even when constructed to scale, models may frequently, because of great discrepancy in size between the model and original, be very misleading.

2. Evidence 🔑195

In eminent domain proceeding, refusing in evidence small model showing condition of land before and after construction of highway was not abuse of trial court's discretion (Code Civ.Proc. § 1954).

3. Trial 🔑56

In eminent domain proceeding, where photographs had been admitted showing condition of land prior to construction of highway, refusal to admit other photographs of same land was within discretion of court.

4. Eminent domain 🔑262(5)

In eminent domain proceeding, where objections to questions concerning collection of rainwater by highway and its diversion onto lands of defendant were sustained, error, if any, was cured by permitting witness to later testify fully on the subject.

5. Evidence 🔑474(5)

In eminent domain proceeding, where witness was unable to tell how much of her land was washed away by diversion of water on her lands, on question being repeated, objection on ground that answer would be speculative was properly sustained.

6. Eminent domain 🔑262(5)

In eminent domain proceeding, sustaining objections to questions of value of particular sales asked of expert witnesses, where other sales were admitted on cross-examination and court was unduly strict in some of its rulings, was not prejudicial to defendant.

7. Witnesses 🔑268(1)

In eminent domain proceeding, a wide latitude should be allowed on cross-examination and in inquiring into value of land even to the asking of leading questions (Code Civ. Proc. § 2048).

8. Eminent domain 🔑195

In eminent domain proceeding, where defendant did not specially plead necessity and cost of constructing drainage system though alleging flooding and erosion, testimony as to cost of such system was properly stricken since necessity of constructing protective works, if it exists, must be alleged in answer.

9. Damages 🔑142

Damages which naturally but not necessarily follow from act complained of must be specially pleaded to allow adverse party to be prepared to meet evidence on subject at trial.

10. Eminent domain 🔑203(1)

In eminent domain proceeding, proof of damage to lands lying on same side of avenue as land taken for highway, though avenue was an unopened street platted in 1872, was properly limited to contiguous lands not separated from portion condemned by public street.

11. Eminent domain 🔑221

In eminent domain proceeding, evidence of damages by erosion and flooding was for jury.

12. Constitutional law 🔑280

Where no procedural right was denied and evidence supported verdict, judgment in eminent domain proceeding was not in contravention of Constitution on ground of inadequacy of compensation allowed (Const.U. S. Amend. 14).

13. Eminent domain 🔑259

In eminent domain proceeding, where defendant complained of failure to give certain instructions but failed to print instructions given on subject, court would not consider error complained of (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 3).

14. Eminent domain 🔑262(5)

In eminent domain proceeding, where on whole record defendant suffered no prejudice by court's rulings on value, defendant could not complain though court might have erred in a few rulings.

15. Trial 🔑244(5)

In eminent domain proceeding, court was not bound to give, on its own motion, cautionary instruction to take into account in weighing testimony of plaintiff's witnesses on value, their business or pecuniary interest, since court should not single out witnesses for instructions as to weight to be given their testimony.

16. Eminent domain 🔑255

Where court in eminent domain proceeding gave usual instruction that jury in weighing testimony of witness might consider among other matters witness' real or apparent interest in subject of controversy, defendant failing to propose more specific instruction on subject could not complain.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Eminent domain proceedings by San Mateo County, a political subdivision of the state of California, against Margaret E. Christen, Annie H. Darbee, Irene L. Baciocco, and Edward Devincenzi. From the judgment, Annie H. Darbee, Irene L. Baciocco, and Edward Devincenzi appeal.

Affirmed.

Keyes & Erskine, of San Francisco, for appellant Darbee.

Vincent Hallinan, Emmett R. Burns, and F. Bruce McMullen, all of San Francisco, for appellants Baciocco and Devincenzi.

Andriano & Lowery, of San Francisco, and Gilbert Farrell, for respondent.

DOWLING, Justice pro tem.

Two appeals, one by defendant Annie H. Darbee, and the other by defendants Irene L. Baciocco and Edward Devincenzi, are presented on a single typewritten transcript, from judgments in an eminent domain proceeding to acquire a strip of land for a public highway. The trial was had before a jury and the judgments followed the verdicts. Since all the questions presented on the two appeals are not the same, we shall consider the two appeals separately.

The Darbee Appeal.

Appellant Darbee was the owner of 23 acres of land within the corporate limits of the town of Lawndale, a portion of said land lying on either side of a public street called Robson avenue, delineated on a subdivision map filed for record in 1872, but never actually opened or improved upon the ground. Of this tract respondent condemned 4,357 acres for which the jury awarded $4,021.30. It also found that the remaining land of this appellant was neither damaged nor benefited by the severance. The case was tried after the highway had been completed and was in use.

[1] This appellant offered a model prepared by an engineer to show the condition of the tract before the construction and afterwards. To the introduction of this model the court sustained an objection. Conceding that a foundation was laid for the introduction of the model, the use of models must lie largely within the discretion of the trial court. While models may frequently be of great assistance to a court and jury, it is common knowledge that, even when constructed to scale, they may frequently, because of the great disparity in size between the model and the original, also be very misleading, and trial courts must be allowed wide discretion in ruling upon whether to admit them into evidence or not. Upon the general subject of the admission of material objects into evidence, section 1954, Code of Civil Procedure, provides: "The admission of such evidence must be regulated by the sound discretion of the court."

[2] In Dameron v. Ansbro, 39 Cal.App. 289, 178 P. 874, 879, complaint was made of the trial court's refusal to allow a medical witness to use a human skeleton to illustrate his testimony. The court said: "We do not understand that appellant was thereby denied any legal right. It is a matter left to the sound discretion of the court." See, also, Leonard v. Hume, 5 Cal.App.(2d) 41, 41 P.(2d) 965. We cannot hold that the trial court abused its discretion in refusing to allow into evidence a small model of a tract of land several acres in extent.

[3] Complaint is also made of the refusal to admit into evidence five photographs of portions of the land taken before the construction of the highway. Here again the court has a wide discretion. Furthermore, other photographs of the land taken before the highway was constructed were admitted, and there is no showing of prejudice to appellant by the exclusion of these particular photographs.

[4] Objections were sustained to certain questions concerning the collection of rainwater by the highway and its diversion onto this appellant's lands. Thereafter the witness was permitted to testify very fully on the subject, and the error, if any, was thereby cured.

[5] This appellant was asked how much of the top soil on her land had been washed away by reason of the rain being diverted onto it from the road. She said

that she could not answer the question. Thereafter the question was repeated, and the court properly sustained an objection on the ground that the witness' answer would be speculative.

[6, 7] Objections were sustained to some questions of expert witnesses on value called by respondent as to their knowledge of particular sales. A wide latitude should be allowed on cross-examination in inquiring into such matters (Estate of Ross, 171 Cal. 64, 151 P. 1138; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L.R.A. 604; Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681), even to the asking of leading questions. Code of Civil Procedure, § 2048. However, evidence of other sales, some of them at high prices, was admitted on cross-examination, and while we feel that the trial court was unduly strict in a few of its rulings, we cannot say on the whole record that this appellant suffered prejudice thereby.

[8, 9] An expert witness for this appellant testified fully that to avoid serious damage to the land from erosion, it would be necessary to construct a drainage system. Over objection he testified that the cost of such a system would be $10,000. The evidence as to cost was afterwards stricken out. Evidence of the cost of protecting land from injury which will otherwise be caused by a public improvement has been held admissible in eminent domain cases on two theories: (1) That while not itself an element of damage it may be considered on the question of depreciation of market value (Butte County v. Boydston, 64 Cal. 110, 29 P. 511; Currie v. Glasscock County [Tex.Civ.App.] 212 S.W. 533); (2) that if the cost of protection is less than the depreciation in market value which would otherwise accrue, it furnishes the true measure of damages (Nichols on Eminent Domain, vol. 2, p. 728). This appellant did not specially plead the necessity and cost of constructing a drainage system, although she did allege damage to her land by flooding and erosion. Moran v. Ross, 79 Cal. 159, 165, 21 P. 547, is authority for the rule that in eminent domain proceedings the necessity of constructing protective works, if it exists, must be alleged in the answer. It is a general rule of pleading that damages which naturally, but not necessarily, follow from the act complained of must be specially pleaded to allow the adverse party to be prepared to meet evidence on the subject at the trial. Gomez v. Reed, 178 Cal. 758, 763, 174 P. 658; Stevenson v. Smith, 28 Cal. 102, 104, 87 Am.Dec. 107. Under the authority of these decisions, the court properly struck out this evidence as not within the issues.

As to other rulings on evidence, of which complaint is made, it is sufficient to state that we have examined them and find them either not erroneous or not prejudicial.

[10] The court limited proof of damage to the lands lying on the same side of Robson avenue as the land taken for the highway. Since Robson avenue was not improved or open on the ground to travel, and since appellant was using the entire tract as a unit, it is claimed that this ruling was error under City of Stockton v. Marengo, 137 Cal.App. 760, 31 P.(2d) 467. The cases are not parallel. In the Marengo Case the defendant had platted the tract into blocks and streets, but had not sold it and continued to occupy it as a whole. In the case before us the tract was platted in 1872, and in 1910 and 1913 appellant purchased the lots forming her holding by reference to the recorded map. Under the circumstances, the case is ruled by East Bay Municipal Utility District v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178, and Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 P. 705, and the evidence of damage was properly limited to the contiguous lands not separated from the portion condemned by a public street.

[11] Finally this appellant argues that the evidence of damages by erosion and flooding was uncontradicted and the finding of no damage is without support in the evidence. The jury was taken to view the premises, and there was ample evidence from expert witnesses that the land suffered no depreciation in market value as a result of the improvement. The case is the ordinary one of a conflict of testimony, the solution of which was for the jury.

The Baciocco and Devincenzi Appeal.

Appellants Baciocco and Devincenzi were the owners of 1.047 acres of which respondent condemned .911 acre. The jury allowed appellant Baciocco for a 17/18 interest in the property taken $774.-

35, and as severance damage to her interest in the portion not condemned $115.60; and to appellant Devincenzi for a 1/18 interest $45.55 and $6.80 severance damage.

[12] These appellants urge that the judgment is in contravention of the Fourteenth Amendment to the United States Constitution because of the inadequacy of the compensation allowed. They do not point out any procedural right which was denied them, and as there was ample evidence to support the verdict, we find this contention without merit.

[13] They complain of the failure to give certain instructions, but they do not print the instructions given on the same subject and we pass that matter without further comment. Rule VIII, § 3, Rules of the Supreme Court and District Courts of Appeal.

[14] They complain of certain rulings upon evidence as to value. While the court may have erred in a few of its rulings, only two instances are cited in the brief and on the whole record we cannot say that appellants suffered any prejudice.

[15, 16] The claim of these appellants that the court of its own motion should have given a cautionary instruction to the jury to take into account in weighing the testimony of respondent's witnesses on value their business or pecuniary interest is without merit. The court should not single out witnesses for instructions as to the weight to be given their testimony. Thomas v. Gates, 126 Cal. 1, 58 P. 315; Estate of Blake, 136 Cal. 306, 68 P. 827, 89 Am.St.Rep. 135; Juchert v. Tenent, 126 Cal.App. 216, 14 P.(2d) 617. The court gave the usual general instruction that in weighing the testimony of a witness the jury is authorized to take into consideration, among other matters, "his real or apparent interest in the subject of the controversy." If appellants had desired a more specific instruction on the subject applicable to all witnesses alike, and we need not decide whether they would have been entitled to one in any event, they should have proposed such instruction. Having failed to do so, they cannot now complain.

The judgments appealed from are affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J

---

22 Cal.App.2d 425

MacPHERSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 11395.

District Court of Appeal, Second District, Division 1, California.

Aug. 25, 1937.

Rehearing Denied Sept. 17, 1937.

Hearing Denied by Supreme Court Oct. 21, 1937.

1. Appearance 🔑9(1)

If a defendant raises any question other than that of jurisdiction or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of defendant's person, defendant's appearance is "general" even if termed "special," and he thereby submits to jurisdiction of the court as completely as if he had been regularly served with summons.

[Ed. Note.—For other definitions of "General Appearance," see Words & Phrases.]

2. Appearance 🔑9(2)

A defendant who wishes to insist upon objection that he is not in court for want of jurisdiction over his person must specially appear for that purpose only.

3. Appearance 🔑9(5)

A defendant in a divorce suit who moved to strike out as surplusage certain portions of plaintiff's petition and affidavit for order to show cause by which plaintiff sought to obtain custody of children, to quash order to show cause, petition and affidavit on ground that petition was uncertain, among other grounds, and whose counsel appeared in support of motion at hearing on order to show cause, entered a "general appearance," rendering question of sufficiency of service immaterial.

4. Mandamus 🔑31, 57(1)

If the trial court has plainly erred on a point of practice either by misapprehending its own rules or a plain rule of law, and in consequence has dismissed an appeal or refused to proceed with cause, a writ of mandate will lie to remedy the erroneous or arbitrary exercise of its discretion, notwithstanding trial court has acted.

5. Mandamus 🔑7

The issuance of a writ of mandate even where the technical rules of law authorize it is, to a large extent, discretionary with the court.

6. Mandamus 🔑3(11)

A writ of mandate would lie to require a trial judge to proceed with hearing in di-

vorce suit of order to show cause by which plaintiff sought to obtain custody of children, where trial court erroneously quashed service of order to show cause notwithstanding defendant appeared generally by asking other relief than that going only to jurisdiction of court and plaintiff would not obtain adequate relief by obtaining another order to show cause.

Original proceeding by Blossom Gray MacPherson, now Blossom Gray Jaffray, for a writ of mandate directed to the Superior Court in and for Los Angeles County, to compel the Superior Court to set an order to show cause for hearing and to proceed with the trial, determination, and disposition thereof.

Writ of mandate issued as prayed.

Gibson, Dunn & Crutcher, of Los Angeles (Thomas H. Joyce and George D. Jagels, both of Los Angeles, of counsel), for petitioner.

Bettin, Painter & Wait and Ray H. Kinnison, all of Los Angeles, for respondent.

DORAN, Justice.

Petitioner herein instituted the present proceeding in mandamus to compel the superior court of Los Angeles county to set an order to show cause for hearing, and to proceed with the trial, determination, and disposition thereof.

The petitioner herein prevailed as the plaintiff in a divorce action and was awarded the custody and control of two minor children of plaintiff and defendant. The judgment in said action was entered November 25, 1931.

It is alleged by petitioner herein that on October 15, 1936, in said divorce proceedings, a petition for an order to show cause was filed, in which it was alleged that defendant in said proceedings was illegally withholding said minor children from the custody of plaintiff and was refusing to deliver said children or either of them to plaintiff which, it was alleged, constituted a contempt on the part of said defendant of said superior court; that an order to show cause was issued and filed on or about October 20, 1936; that a copy of the petition, as well as a copy of the affidavit in support thereof, and a copy of the order to show cause were served on the defendant and an affidavit of service of said copies was filed on or about October 20, 1936; that thereafter said order to show cause came on to be heard on or about the 29th day of October, 1936, in said superior court; that at the hearing thereof defendant purported not to appear but that attorneys for defendant purported to enter a special appearance for the purpose only of making a motion for an order to quash service of said order to show cause on the ground, among other grounds, that the defendant in said proceeding had never been served with a true and correct copy of the affidavit supporting the petition for the order to show cause.

Plaintiff maintained at said hearing, and reasserts as the petitioner herein, that personal service had been duly, properly, and effectually made and that the superior court, respondent herein, had jurisdiction to proceed with the hearing. Petitioner further asserts that a request was made of said superior court to proceed with the hearing as required by law and to dispose of the matters set forth in the petition for order to show cause and to deny the motion of defendant to quash service of the order to show cause, but that the superior court refused, and still refuses, to proceed with said hearing and with the disposition of the matters set forth in said petition for order to show cause, and did at the hearing thereof erroneously grant the motion of the defendant to quash the service of said order to show cause.

It is further contended by petitioner that defendant in said proceeding in fact and in law made a general appearance therein and that plaintiff duly requested said superior court to rule that defendant had so entered a general appearance in said proceeding but that said superior court erroneously refused so to rule.

At the hearing on the order to show cause, the following, in part occurred:

"Mr. Jagels (Attorney for Petitioner): If your Honor please, there is another reason why the court has jurisdiction at this time.

"The Court: Yes.

"Mr. Jagels: That is, your Honor, that although the counsel for the defendant has stated that this is a special appearance, that he makes only a special appearance, he has undoubtedly made a general appearance by request for relief. In his motion, what he calls a motion to quash or dismiss or strike the order to show cause, he attacks—

"The Court: Wait a moment, which one?

"Mr. Jagels: Special appearance only for the purpose of moving to quash and/or dismiss and/or strike order to show cause and petition and affidavit on which said order to show cause is based and to quash service of order to show cause.

"The Court: Oh, all right.

"Mr. Jagels: He states that the order to show was not based upon a sufficient showing."

(Further argument and discussion.)

"The Court: All right. I think the test here is whether or not there has been proper service made on the defendant, you will either have to stand or fall on that one premise.

"Mr. Joyce (Attorney for Petitioner): Your Honor, on that point, I can only say—

"The Court: Wait just a moment.

"Mr. Jagels: Here is a case, your Honor, on that last proposition, the question of whether the appearance of counsel is sufficient.

"The Court: No, I think the only thing you have to do is to show that you have the proper service, and I am not satisfied in my own mind that you have done that.

"Mr. Jagels: In this case it says: 'It appears that Foley appeared by his counsel in answer to the order to show cause, and submitted evidence upon the merits of the application, and resisted the same without objection to the want of personal service. This of itself was sufficient to give the court jurisdiction over him.' 120 Cal. 33, 52 P. 122, 65 Am.St. Rep. 147, Foley v. Foley.

"The Court: There is no question about that, but he is not appearing here and submitting testimony, the first motion he made is a motion to quash service."

(Further argument and discussion.)

"Mr. Joyce: Well, it does appear to me that if it can be shown, and it is shown by Mr. Painter's own affidavit that everything necessary in substance to give Mr. MacPherson notice of this particular hearing was given to him, he received a full, true and complete copy of this order, he received a full, true and complete copy of Mrs. Jaffray's affidavit with the single exception of the notary's certificate and the County Clerk's certificate.

"The Court: I do not feel like getting myself reversed on a proposition of that kind, I would like to conclude it and hear it this morning, but I do not propose to get another reversal."

(Further argument and discussion.)

"Mr. Joyce: It seems to me that when your Honor says a copy, an affidavit which contains everything substantially to give the defendant notice—

"The Court: I know, I wish I could bring myself to that conclusion, but I can't do it, it is not a true and correct copy of the order that was here in this file. All that I can say, if you can show me any authority to the contrary I will be glad to go into it, I will put it over until 2:00 o'clock this afternoon on that one point only, if you can show me any authority that this service is good, all right, otherwise, I will have to sustain Mr. Painter's objection. I will put it over until 2:00 o'clock this afternoon."

(Further argument and discussion.)

"The Court: That is a different situation, but you are asking me to find this man guilty of contempt and put him in jail until such a time as he complies with the order of court in the event I found this man guilty of contempt. If I found he has the present ability and has had the ability to turn these children over to his wife, I could find him guilty of a continuing contempt, and put him in jail until such a time as he turns these children over to the plaintiff. You are asking me to do that and I can't see, on a faulty affidavit such as you have here, that I can do it. Now, if you can show me anything to support your side of this question I will go into it. But, so far you have not.

"Mr. Jagels: Your Honor, this Connecticut case certainly seems to be in point.

"The Court: No, that does not strike me that way.

"Mr. Jagels: Then we have not been able to find any.

"The Court: I do not propose to get a reversal unless I can help it, I have been all these years on the bench and I have only had one reversal and it was not my fault that I was reversed then, and I am going to give you an opportunity to mandamus me if you desire.

"Mr. Joyce: Isn't it true that the defendant has had due and reasonable notice of everything that these proceedings involve?"

(Further argument and discussion.)

"The Court: Anything further on that point?

"Mr. Joyce: No, your Honor.

"The Court: The defendant's motion will be granted. I will draw a minute order and mail you both a copy of it."

After the hearing and ruling as above indicated, plaintiff in said action obtained another order to show cause, based on the same affidavits, but was unable to effect service, hence this petition for writ of mandate to compel the superior court to proceed with the hearing on the original order.

[1, 2] In connection with the hearing on the order to show cause, the attorneys representing the defendant were present at the appointed time and place but purported to make only a special appearance. Mr. Painter of defendant's counsel stated: "In this case, if your Honor please, I am appearing especially and only for the purpose of making two motions, both of which motions have been filed in court. I am not at this time making a general appearance the appearance is only for the purposes set forth in the motion." The first of the two motions referred to is entitled, "Special Appearance only for the purpose of striking from the Petition for Order to Show Cause and the Affidavit in support of Petition for Order to Show Cause certain portions thereof," and declared, in substance, notice of intention so to do on the grounds that the said certain portions of the petition and affidavit were "irrelevant, immaterial, surplusage, sham and conclusions of law." The second motion is entitled, "Special Appearance only for the purpose of moving to quash and/or dismiss and/or strike Order to Show Cause and Petition and Affidavit on which said Order to Show Cause is based and to quash service of Order to Show Cause," and it declared said motion would "be made on the following grounds." Then followed twelve alleged grounds, so numbered, the last of which specified ten particulars, from a to j, inclusive, in which it was alleged the affidavit and petition were uncertain. Although entitled a "motion," it was, in effect, a demurrer to the petition, and, although purporting to make only a special appearance, nevertheless, the result as a matter of fact and of law was a general appearance. As has been heretofore declared: "It is the well-settled rule that if a party defendant raises any question other than that of jurisdiction or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed 'special,' and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons. Security Loan & Trust Co. v. Boston & South Riverside Fruit Co., 126 Cal. 418, 58 P. 941, 59 P. 296; Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317. If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all other purposes except to make that objection. Taylor v. Superior Court, 93 Cal. App. 445, 269 P. 727. Inasmuch as the defendant, in the divorce case, incorporated, in her motion to strike out and vacate portions of the interlocutory decree, several matters in addition to the question of the jurisdiction of the court over the person of the defendant, we are of the opinion that she thereby entered her general appearance in the said action." Burrows v. Burrows, 10 Cal.App.(2d) 749, 750, 52 P.(2d) 606, 607.

The Supreme Court, on the same subject, declared: "An act of a defendant by which he intentionally submits himself to the jurisdiction of the court in that action for the purpose of obtaining any ruling or order of the court going to the merits of the case, as, for example, a motion to strike out part of the complaint, or the making of stipulations, as in the cases above mentioned, which may reasonably be construed to imply that the court has in that action acquired jurisdiction of the person of the defendant, will be equivalent to an appearance, although not strictly in accordance with the terms of section 1014 [Code of Civil Procedure]." Davenport v. Superior Court, 183 Cal. 506, 511, 191 P. 911, 913.

In the case of Shelley v. Casa De Oro, Ltd., 133 Cal.App. 720, 723, 24 P.(2d) 900, 901, a situation somewhat similar to the case at bar was presented, and the court held that "It seems to be settled in this state that the inclusion in the motion of any ground inconsistent with the sole claim that the judgment is entirely void for want of jurisdiction of the person is sufficient to convert the attempted special appearance into a general appearance."

[3] The presence of defendant's counsel at the hearing on the order to show cause as above described, in the light of the above-mentioned authorities, constituted a general appearance, and the question of the sufficiency of the service, therefore, was immaterial. It follows that the court's ruling in that regard was error.

At this point, therefore, in the proceedings at the hearing on the order to show cause, jurisdiction in the court of the subject matter and of the parties was established, but by an erroneous ruling the trial judge, in effect, held that the court was without jurisdiction. It should be noted here that the facts were not in dispute; the ruling was on a question of law only. As a result of the ruling, petitioner for the order to show cause was not only denied relief, but was denied an opportunity to make any showing to raise the question.

As to whether the writ of mandate will lie to correct such an error, there seems to be some division of authority. For example, "It is elementary that a writ of mandate is not a writ of error. 'The only duty of the court was to try the action and to render judgment. This it has done. If any errors have been committed during the progress of the trial, they cannot be corrected by means of the writ of mandate.' Short v. Superior Court, 94 Cal. App. 664, 271 P. 783. * * * A court having the matter properly before it, has as, is often said, jurisdiction to decide either erroneously or correctly. It is only when a court erroneously refuses to accept jurisdiction that mandate will lie. Hayward v. Superior Court, 130 Cal.App. 607, 20 P.(2d) 348. * * * 'If the court erred in this conclusion (which we do not decide), it was only an error made by the court in the exercise of its jurisdiction. It was not a refusal to act upon the merits of the matter presented. * * *' [Brock v. Superior Court, 119 Cal.App. 5, 5 P. (2d) 659.]" Thomas v. Superior Court, 4 Cal.App.(2d) 356, at page 359, 41 P.(2d) 220, 222. And, as was held in Hayward v. Superior Court, supra, 130 Cal.App. 607, at page 610, 20 P.(2d) 348, 350, "The rule is too well settled to require exposition here, that the writ of mandate cannot be employed as a corrective of error. It will only issue for the purpose of enforcing the commencement of a wholly unexercised, or the completion of a partially exercised jurisdiction."

[4] On the other hand, the Supreme Court in an extensive opinion on the subject declared, "Mandamus lies to compel an inferior court to act when it has neglected or refused to do so. * * * that where a court has jurisdiction of a cause, it should not be permitted, by an arbitrary or erroneous order, to divest itself of jurisdiction, but it should be compelled to proceed with the case to judgment. * * * The weight of authority, and certainly of reason, would seem to say that, if the lower court has plainly erred on a point of practice, either by misapprehending its own rules or a plain rule of law, and in consequence has dismissed an appeal, mandamus will lie to correct and remedy the erroneous or arbitrary exercise of its discretion, notwithstanding it has acted." Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 477, 114 P. 978, 979. Although the case just cited arose out of the dismissal of an appeal, the reasoning therein is applicable to the case at bar.

In the Matter of Tirey L. Ford, on Habeas Corpus, 160 Cal. 334, 116 P. 757, 761, 35 L.R.A.(N.S.) 882, Ann.Cas.1912D, 1267, the Supreme Court again reviewed the subject of the writ of mandamus, in which case it was declared: "And, while the general rule announced in Strong v. Grant, [99 Cal. 100, 33 P. 733] that a writ of mandate cannot be issued to correct the errors of a court in passing upon questions regularly submitted to it in the course of judicial proceedings or to control the exercise of its discretion undoubtedly obtains, it is not universally true that such writ will not issue to control such discretion or to require a judicial tribunal to which a matter for determination is submitted, to act in a particular way. * * * It is hardly necessary to say that in all the matters particularly referred to the exercise of judicial discretion by the lower court is in the first instance involved, and yet it is held that on mandamus such judicial discretion may be controlled, and the lower court or judge thereof, compelled to act in a particular way when the facts are not in dispute, and the court has come to a wrong conclusion of law therefrom, or disregarded a duty expressly enjoined by the law under the undisputed facts. This subject of controlling the judicial discretion of the lower court by mandamus is exhaustively treated in Wood v. Strother, 76 Cal. 545, 18 P. 766, 9 Am.St.Rep. 249, where, after reviewing the authorities we have referred to and authorities from other jurisdictions, it is said that: 'In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to control judicial action or to compel a tribunal to act in a particular way.' In this same case the court lays down the test under which the right to a writ of mandate is to be determined, where it is said: 'In every case the tribunal that is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final; and, if not, whether there is any other "plain, speedy, and adequate remedy." If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was not intended to be final, but there is another "plain, speedy, and adequate remedy," the writ cannot issue; for it was not designed to usurp the place of other remedies. But, if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one."' "

In the case at bar, the order of the superior court in granting the motion of defendant could not in any sense be final; that is to say, the petitioner for the order to show cause was not, by such order, left altogether without a remedy, and, as has been heretofore mentioned, another order to show cause was obtained. Meanwhile, however, the defendant obviously avoided service of the second order, the effect of which was to render petitioner's remedy above mentioned only nominal. To refuse a writ of mandate under the facts and circumstances revealed by the record herein would, in effect, condone and encourage an unwarranted effort to evade and avoid the orderly and legal processes of the court.

[5, 6] In the last analysis, as was hitherto declared, "The issuance of such writ, even where the technical rules of law authorize it, is to a large extent discretionary with the court." Fawkes v. City of Burbank, 188 Cal. 399, 401, 205 P. 675, 676. And, as was quoted in Wiedwald v. Dodson, 95 Cal. 450, 454, 30 P. 580, 581, "The writ of mandamus is not wholly a writ of right, but lies to a considerable extent within the sound judicial discretion of the court where the application is made; * * * and no court should allow a writ of mandamus to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law." To issue the writ in the case at bar does no violence to the doctrine just mentioned.

Under the facts presented by the record herein the writ of mandamus should issue as prayed for, and it is so ordered.

We concur: HOUSER, P. J.; YORK, J.

---

22 Cal.App.2d 373

DE LA MAR v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10601.

District Court of Appeal, First District, Division 1, California.

Aug. 23, 1937.

1. Criminal law 🔑576(2)

The court has no discretionary power to deny a defendant his right to a speedy trial (Pen.Code, § 1382, as amended by St.1935, p. 1468; Const. art. 1, § 13).

2. Criminal law 🔑576(2)
Mandamus 🔑61

A delay of over a year after return of indictment in taking any steps in prosecution of a defendant whose whereabouts were easily ascertainable, in absence of any excuse for delay except the absence of funds to return defendant to city in which prosecution was brought, was a violation of defendant's constitutional right to a speedy trial, and hence authorized the issuance of a writ of mandate to terminate the prosecution (Pen.Code, § 1382, as amended by St.1935, p. 1468; Const. art. 1, § 13).

Original proceeding by Frank R. De La Mar for a writ of mandate directed to the Superior Court of the state of California in and for the City and County of San Francisco.

Peremptory writ of mandate issued as prayed.

Arthur C. Fisher, of Los Angeles, for petitioner.

Matthew Brady, Dist. Atty., and August L. Fourtner, Asst. Dist. Atty., both of San Francisco, for respondent.

TYLER, Presiding Justice.

Application for writ of mandate to terminate the prosecution of petitioner on two counts of grand theft and one count of violation of the Corporate Securities Act (St.1917, p. 673, as amended) as contained in an indictment found against petitioner. The petition alleges among other things that the indictment was returned on the 17th day of April, 1936, and that petitioner had no knowledge of the existence of the same at that time or at any time until the 21st day of May, 1937, when he received a threatening communication through the mail informing him that a warrant was issued for his arrest and that his address would be given to the authorities unless he made a settlement of his business dealings; that upon receiving the communication he replied to the same, informing the writer that he was not obligated to any one and that no cause existed for civil or criminal action against him. Thereafter petitioner received a second communication of a like character, whereupon he went to the sheriff of Kern county and had him teletype to San Francisco and ascertain whether any warrant of arrest existed; that on June 5, 1937, petitioner received the first knowledge of the existence of said indictment and of said warrant through the sheriff of Kern county, and immediately upon obtaining such information he caused the said sheriff to teletype to San Francisco that he would voluntarily appear on the 11th day of June, 1937, on which date he appeared and gave bail for his release; that on the date the indictment was found petitioner was and had been a resident of the city of Bakersfield, Kern county, and at said time and for several months prior thereto had been actively engaged in the business of contracting the erection of oil derricks in said city and was registered with the bureau of vocational standards and had been so registered since the year 1934; that he was a registered voter in Bakersfield and his name was contained in the city and telephone directories; that at the time of the transactions involved in the indictment he occupied a business address in San Francisco and upon leaving such city he filed with the United States post office at San Francisco the customary change of address card. The petition further recites that petitioner never at any time received any demand or intimation from any one concerning any indebtedness. On June 16, 1937, petitioner moved to dismiss the prosecution and indictment on the ground that he was not brought to trial within sixty days after the finding of the indictment as required by the provisions of section 1382, chapter 8, title 10, part 2, of the Penal Code, as amended by St.1935, p. 1468, and as provided by section 13, article 1, of the Constitution of the state of California, and at the same time filed and served an affidavit setting forth in detail the facts hereinabove recited. The motion came on for hearing and in response to the showing made the people placed on the stand two police officers who testified that they made search in San Francisco for petitioner and ascertained that he was located in southern California, but that they made no effort to apprehend him for the reason that the department had no funds with which to return him to San Francisco. After the hearing the court denied the motion to dismiss the prosecution, and the present proceeding followed.

[1, 2] In our opinion the facts entitle petitioner to the relief which he seeks. The prosecution was commenced in April, 1936, and nothing was done in the matter for over a year thereafter. The whereabouts of petitioner were easily ascertainable and no excuse was tendered for the delay except the absence of funds. This is not a sufficient excuse. People v. Disperati, 11 Cal.App. 469, 476, 105 P. 617. A party charged with crime has the constitutional right to a speedy trial and the court has no discretionary power to deny him a right so important. It would be unreasonable to hold that a delay of over a year was not in violation of the constitutional right to a speedy trial where the delay was not traceable to petitioner. The policy of the law upon this subject has been declared by the Legislature and by con-

stitutional enactment, and courts have not hesitated by writ of mandamus or on appeal to compel the dismissal of felony cases not speedily brought to trial in accordance with the legislative and constitutional requirements. Harris v. Municipal Court, 209 Cal. 55, 285 P. 699.

Let the peremptory writ of mandamus issue as prayed.

We concur: KNIGHT, J.; CASHIN, J.

---

22 Cal.App.2d 435

PEOPLE v. KISER et al.

Cr. 2990.

District Court of Appeal, Second District, Division 1, California.

Aug. 26, 1937.

Hearing Denied by Supreme Court Sept. 23, 1937.

1. Burglary 🔑41(1)
Robbery 🔑24(1)

Evidence supported conviction for first-degree robbery and first-degree burglary.

2. Constitutional law 🔑203

Statutes authorizing longer term where defendants are armed with deadly weapons were not invalid as ex post facto as to defendants who were convicted of first-degree robbery and burglary committed prior to enactment of statutes, where judgments rendered were in full accord with provisions of Firearms Act, since allegedly ex post facto statutes had no effect on provisions of Firearms Act or on provisions of statute dealing with imprisonment, and effect as to other existing statutes was only as to procedure (Pen.Code, §§ 969c, 1158a, as added by St.1935, pp. 1705, 1706; Pen.Code, § 1168, subd. 2, as amended by St.1935, p. 1700; St.1923, p. 695, as amended).

3. Criminal law 🔑1208(8)

Statutes authorizing imposition of greater punishment where defendant is armed could be invoked against codefendants, though only one of them had weapon, since possession and use of weapon by one constituted possession and use by the other (Pen. Code, §§ 969c, 1158a, as added by St.1935, pp. 1705, 1706).

4. Criminal law 🔑1144(½)

That single member of jury viewed situation in certain manner would not give rise to assumption that entire jury viewed situation in same manner.

5. Criminal law 🔑887

A jury is to be governed entirely by instructions which court may give it.

6. Criminal law 🔑863(2)

In prosecution of two defendants for robbery and burglary, court's answer to question of single juror that it was not possible to find verdict for one defendant in different degree of crime though only one defendant had weapon was not error, where court merely reiterated law given to jury in written instruction, since in commission of felony by two or more persons, possession and use of weapon by one constitutes possession and use of weapon by the others (Pen.Code, §§ 969c, 1158a, as added by St. 1935, pp. 1705, 1706).

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Ray Kiser and John Garry Bryan were convicted of first-degree robbery and first-degree burglary, and they appeal.

Judgments affirmed.

Morris Lavine, of Los Angeles, for appellants.

U. S. Webb. Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

Each of the defendants appeals from a judgment of conviction of the commission by him of each of the crimes of first-degree robbery and first-degree burglary.

[1] On the trial of the action, the evidence clearly established the fact that the crimes of which the defendants were convicted were committed simultaneously, one with the other. Each of the defendants was positively identified as one who had actively participated in the commission of such criminal offenses, although but one of them either exhibited or used a "gun" in the commission thereof. The point urged by appellants that the evidence was insufficient to support the judgment is without merit.

[2] With respect to the fact, as in substance was found by the jury, that the defendants were "armed with a deadly weapon, to-wit, a revolver, capable of being concealed upon the person," etc., and that because of such finding, the defendants were liable to be, and in fact were, sentenced to the state prison to serve a term therein longer than that for which either of them would, or legally could, have been sentenced had such finding not been made, appellants urge the point that since assertedly it appears that the statute under the provisions of which such longer term was authorized to be imposed was not enacted until after the crimes were committed, such statutes were "ex post facto," and, consequently, that they were void and of no effect as far as either of the defendants was concerned. But with respect to punishment which legally may be imposed on one who theretofore has been convicted of the commission of a felony, an examination of the several pertinent sections of the Penal Code, as well as of the "Firearms Act" (Stats.1923, p. 695, as amended), to which appellants refer, discloses the fact that on the date when the crimes were committed, subdivision 2 of section 1168 of the Penal Code (as amended by St.1935, p. 1700), in part, provided that "for a person not previously convicted of a felony, but armed with a deadly weapon either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, five years"; and that at said time section 3 of the "Firearms Act" (St. 1923, p. 696) in part provided that "upon conviction of such felony or of an attempt to commit such felony, he shall in addition to the punishment prescribed for the crime of which he has been convicted, be punishable by imprisonment in a state prison for not less than five nor more than ten years." It is also noted that both of such provisions of said statutes were in effect at the time when the crimes herein were committed; and that the judgments that were rendered against the defendants were in full accord with the provisions of such statutes and with the so-called "indeterminate sentence law," in that in each of such judgments each of the defendants was sentenced to imprisonment in the state prison "for the term prescribed by law." In other words, as far as either section 969c (as added by St.1935, p. 1705) or 1158a (as added by St.1935, p. 1706) of the Penal Code provides for the length of term of imprisonment that may be imposed upon a defendant who has been convicted of a felony that was committed by him at a time when he was "armed with a deadly weapon," neither of such sections, which appellants expressly designate and contend are "ex post facto," has any effect upon the provisions of either section 1168 of the Penal Code or of the "Firearms Act" (Stats.1923, p. 695, as amended). Besides, an examination of both section 969c and section 1158a reveals the fact that, as far as they may affect other existing statutes, each of such former statutes is devoted solely to matters of procedure. It follows that the point presented by appellants cannot be sustained.

[3] For the reason that but one of the defendants was armed at the time when the several criminal offenses were committed by them, appellants urge that the one who was not armed is not subject to the provisions of the several statutes which authorize the imposition of punishment greater than that where a convicted defendant was not armed at the time when the crime was committed. Both in principle and directly, the point heretofore has been ruled upon, and is well established contrary to appellants' suggestion in that regard. People v. Gillstarr, 132 Cal. App. 267, 22 P.(2d) 549; People v. Lewis, 140 Cal.App. 475, 35 P.(2d) 561; People v. Jones, 114 Cal.App. 91, 299 P. 559, and authorities there respectively cited.

Appellants contend that "the court invaded the province of the jury," in that at a time prior to that when the jury had agreed upon a verdict, but at a time when it had been returned into the courtroom, one of the jurors inquired of the trial judge whether it was "possible to find a verdict for one in a different degree of crime"; to which question the trial judge replied, "No, it is not. Under the circumstances it is the same degree as to both defendants."

[4-6] With respect to the question thus presented, in substance, appellants argue that since it was the province of the jury to determine from the evidence whether either of the defendants was, or whether both of them were, guilty of either of the offenses of which they were charged, and, if guilty, to fix the degree of guilt thereof, the language that was used by the trial

judge was prejudicial to the rights of the defendants in that it had a tendency to deprive the jury of its proper function in the premises. But on examination of the situation, it becomes clear that in effect all the trial judge did was directly to answer the question that had been asked, and thereby orally to reiterate the law that already had been given to the jury in one of the court's written instructions. Regarding either the question of guilt of defendants, or, if guilty, in what degree of guilt, as far as is disclosed by the record, there was not the slightest indication given by the trial judge to the jury as to its duty in the premises. Although it is possible, as suggested by appellants, that from the mere fact that a single member of the jury asked the question, "the (entire) jury viewed the situation differently as to one defendant than the other," as a matter of fact, the actual existence of such a condition could not be established, but such assumption necessarily would have to rest upon speculation or conjecture, and hence could not properly form the basis for a ruling that because of such incident one of the defendants was adversely affected. It may be that in some instances a verdict may be influenced by the natural sympathy which a jury has for a defendant; but in the administration of justice, it is equally manifest that emotions should not be permitted to become an impelling force in reaching a conclusion on a question of fact. As far as the law is concerned, the jury is, or should be, governed entirely by the instructions which the court may give to it. And in the instant matter, even though the jury may have had the impression that because one of the defendants was not in the physical possession of a "gun," the verdict as to him should be different from that which should be returned as to the other defendant, nevertheless, the law is well established that in the commission of a felony by two or more persons, the possession and use of a "gun" by one of such persons constitutes a possession and use of the weapon by each of the others; and, as hereinbefore has been indicated, the jury was so instructed, not only in writing, but orally. In such circumstances, neither of the defendants has a just and legal right to complain.

The judgments are affirmed.

We concur: YORK, J.; DORAN, J.

9 Cal.2d 526

CHRISTIN et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 16126.

Supreme Court of California.

Aug. 27, 1937.

Rehearing Denied Sept. 23, 1937.

1. Dismissal and nonsuit 🔑45

Statute providing for dismissal of action not brought to trial within five years after filing thereof, unless parties have stipulated for extension, is mandatory (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

2. Dismissal and nonsuit 🔑60(6)

Estoppel by defendant's conduct in delaying action by instituting proceedings for change of venue and inducing plaintiff to allow cause to go off calendar pending negotiations for settlement is not proper ground for exception to terms of statute requiring dismissal of action not brought to trial within five years after filing thereof (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

3. Dismissal and nonsuit 🔑60(3)

Defendant's motion to dismiss action not brought to trial within five years after filing thereof was properly denied, where plaintiff's appeal from order changing venue was pending for three years and nine months of such period; it being impossible for plaintiff to bring cause to trial during such interval, though appeal did not divest trial court of jurisdiction to proceed, in absence of supersedeas (Code Civ.Proc. § 949; § 583, as amended by St.1933, p. 853).

4. Dismissal and nonsuit ⚿60(3)

Exceptions to statute requiring dismissal of action not brought to trial within five years after filing thereof arise from party's inability from causes beyond his control to bring case to trial within such time, whether because of court's total lack of jurisdiction or impracticability and futility of proceeding to trial, as during pendency of appeal from order changing venue (Code Civ. Proc. § 583, as amended by St.1933, p. 853).

◆

In Bank.

Proceeding by Estelle Porter Christin and husband for a writ of prohibition to the Superior Court of the State of California in and for the County of Los Angeles.

Alternative writ discharged, and peremptory writ denied.

Guthrie & Darling, of Los Angeles, and Charles A. Christin, of San Francisco, for petitioners.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, Clyde C. Shoemaker, and Winthrop O. Gordon, all of Los Angeles, for respondent court.

LANGDON, Justice.

This is a petition for a writ of prohibition to restrain the respondent superior court from proceeding further in an action which petitioner seeks to have dismissed under section 583 of the Code of Civil Procedure (as amended by St. 1933, p. 853).

In the main action, Charles W. Story as plaintiff sued Estelle Porter Christin and Charles A. Christin (petitioners herein) as defendants, for damages for conversion. The action was brought in the Los Angeles Superior Court on January 24, 1930. The defendants filed a demurrer and motion for change of venue to San Francisco. There were several continuances, and prior to the hearing an amended complaint was filed. On May 16, 1930, the court denied the motion for change of venue.

The defendants demurred to the second amended complaint, filed a motion to strike, and also a second motion for change of venue, based upon the same grounds as the first. After a number of continuances, the court on July 17, 1930, made an order granting the second motion for change of venue from the superior court of Los Angeles county to the superior court of the city and county of San Francisco. The court thereupon ordered the action transferred, and in August, 1930, the clerk transmitted all pleadings and papers to the clerk of the San Francisco superior court. Meanwhile, on August 14, 1930, the plaintiff appealed from the order granting the change of venue, and the appeal was pending in the District Court of Appeal, Second Appellate District, Division 1, until March 22, 1934, at which time that court reversed the order. The decision was upon the settled principle that where a motion for change of venue is once made and denied, the defendant has no right to renew the motion. Story v. Christin, 137 Cal.App. 484, 30 P.(2d) 1016.

The remittitur was issued May 22, 1934, and on June 12 the pleadings and other papers were returned to respondent court. Thereafter defendants' demurrer to the amended complaint came up for hearing and was continued until on November 22, 1934, the court sustained the same. On January 7, 1935, plaintiff Story filed a second amended complaint, to which defendants filed another demurrer and motion to strike. The demurrer was overruled, and the motion to strike denied. Defendants filed an answer, to which plaintiff demurred, and on June 6, 1935, the demurrer was overruled. Trial was then set for October 4, but in September the parties orally stipulated that the cause go off calendar pending negotiations for a settlement. Accordingly, on October 4, 1935, the cause went off calendar.

On July 3, 1936, plaintiff again moved to set the cause for trial and the court designated August 12, 1936, as the trial date. But on July 15, 1936, defendants filed a motion to dismiss the action on the ground that it had not been brought to trial within five years after filing. Code Civ.Proc. § 583; Rosefield Packing Co. v. Superior Court, 4 Cal.(2d) 120, 47 P.(2d) 716. The court denied the motion and reset the action for trial.

Defendants (petitioners) filed a petition for a writ of prohibition in the District Court of Appeal, Second Appellate District, Division 2, seeking to prevent the respondent superior court from proceeding with the trial. The said court denied the petition without opinion. A hearing was granted by this court, and an alternative writ of prohibition issued. Meanwhile, the main action went off calendar.

[1, 2] The governing statute, section 583 of the Code of Civil Procedure, is mandatory, requiring dismissal of an action not brought to trial within five years from the filing thereof, unless the parties have stipulated for an extension. Rosefield Packing Co. v. Superior Court, supra. The present action, commenced in January, 1930, was subject to dismissal at the time of the motion made by petitioners (July 15, 1936), unless the circumstances set forth above in some way interrupted the running of the period. Respondent has advanced several reasons why the statutory period should not be deemed to have elapsed. It is suggested, for example, that the conduct of petitioners in delaying the action by the proceedings instituted for change of venue, and further by their acts inducing the plaintiff to allow the cause to go off calendar pending negotiations for settlement, justifies the application of the doctrine of estoppel. On this ground it is argued that the respondent court acted within its jurisdiction in denying the motion, and that consequently prohibition will not lie. But estoppel resulting from such conduct does not appear to be a proper ground for creating an exception to the terms of the statute. See Miller & Lux v. Superior Court, 192 Cal. 333, 339, 219 P. 1006.

[3] We are nevertheless of the opinion that the motion was properly denied for another reason. Respondent contends that while the appeal from the order changing venue was pending in the District Court of Appeal, it was not possible for the plaintiff to bring the cause to trial; and that upon the successful termination of this appeal, plaintiff was restored to his position at the time the erroneous order was made, with the result that the statutory period provided by section 583 did not run during the interval of 3 years and 9 months. In our view this contention is sound, and the peculiar circumstances of this case must be deemed to give rise to one of the exceptions to the terms of section 583.

Petitioners relying upon the general language of such cases as Miller & Lux v. Superior Court, and Rosefield Packing Co. v. Superior Court, supra, argue that in the light of the plain language of the statute there is only one circumstance that can suspend the running of the period, and that is the written stipulation provided for by the section itself. These decisions cannot, however, be so narrowly interpreted. It may be true that they absolutely deny any means of suspension, save by written stipulation, where it is *possible* to bring the cause to trial. But, despite the mandatory language of the statute, *implied exceptions* have been recognized where it was *not possible* to bring the cause to trial. Thus, where an appeal from a judgment is taken, the trial court has no jurisdiction to proceed in the cause during the pendency of the appeal, and consequently the time consumed on appeal is not considered as part of the statutory period. Kinard v. Jordan, 175 Cal. 13, 164 P. 894. And where contestants of a will were induced by fraud to consent to a dismissal of their contest, and later had the dismissal vacated, the court held that the time between the dismissal and the reinstatement of the action was to be excluded in computing the five-year period. Estate of Morrison, 125 Cal. App. 504, 14 P.(2d) 102. See, also, Allyne v. Superior Court, 200 Cal. 661, 254 P. 564.

These cases are not, it is true, directly analogous to the instant case. Petitioners argue that they are all distinguishable on the ground that in each of them the court below had lost *jurisdiction* to proceed in the cause, e. g., by reason of the appeal or the dismissal which divested the court of power to act. They point to the rule that an appeal from an order granting change of venue does not, without a writ of supersedeas, divest the lower court of jurisdiction to proceed. Code Civ.Proc. § 949. Accordingly, they conclude that the statutory period was not suspended in the instant case. They recognize, as they must, the propriety of implied exceptions to section 583 of the Code of Civil Procedure based upon the inability of the parties to bring the cause to trial, but stand on the proposition that this is not such a situation. We are thus led to a consideration of the question whether it was in fact possible for plaintiff to have brought the cause to trial during the time the appeal was pending.

Let us first suppose that plaintiff attempted to go to trial in the Los Angeles superior court. As it subsequently developed upon the determination of the appeal some three years later, this was the proper court. But the court had sent all of the records in the case to San Francisco. The case could not be tried without them. Petitioners suggest that plaintiff might have obtained the records, but we believe this to be gravely in doubt. Plaintiff might have made a motion in the Los Angeles court to have the said court vacate its erroneous order granting the change of venue, but the matter had already been fully heard twice before the court on the first and second motions for change of venue, and there is no reasonable ground to suppose that the motion to vacate would have been of any effect. Plaintiff also might have sought to have the records retransferred from San Francisco to Los Angeles by means of the extraordinary remedy of mandamus; but with his appeal pending, and no other facts then existing to show inadequacy of the remedy by appeal (it being of course impossible to foresee the future delays in its determination), the writ might well have been denied. Hence, where in fact the circumstances made it impossible to try the case in Los Angeles because of the absence of the records, the speculative possibility of changing those circumstances by attempting the above-mentioned remedies is immaterial.

Now we may suppose that plaintiff proceeded to trial in San Francisco, after having taken the position in his contemporaneous appeal that San Francisco was not the proper venue of the action. We may assume that voluntarily going to trial would not constitute a waiver of the right on appeal, and that upon appeal, the Appellate Court would decide, as it did, that the trial court's second order, changing venue to San Francisco, was void. The effect of the reversal would be to nullify the trial in San Francisco and any judgment or rights obtained as a result thereof, restoring all parties to their positions prior to the rendition of the void judgment, i. e., to a position where the cause might be brought to trial in Los Angeles. Howell v. Thompson, 70 Cal. 635, 11 P. 789. We are thus asked to conceive of a protracted trial, requiring the attendance of, and payment of fees to witnesses and jurors, with court costs and attorneys' fees, contemporaneous with a vigorous attempt to render the same nugatory on appeal; and all this in a situation where, in fact, the San Francisco court would not be able to render a valid judgment. Must clients be charged with this unnecessary expense, and the courts clogged with this useless proceeding, all because of a void order of the lower court, or an overstrict interpretation of the dismissal statute?

[4] The purpose of the statute is plain: to prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years, for it permits the parties to extend the period without limitation, by written stipulation. And, as we have already pointed out, despite the mandatory language implied exceptions are recognized. Are these exceptions based upon the technical concept of *jurisdiction*, and applicable only where the court is completely lacking in the legal power to proceed, or do they arise from the fact that the party is unable, from causes beyond his control, to bring the case to trial? The carefully reasoned opinion in Estate of Morrison, supra, is illuminating here. The court declared that the case of Kinard v. Jordan, supra, had "established the precedent of disregarding the time during which the jurisdiction of the trial court was suspended, thereby setting reality above artificiality." The opinion also states (at page 510 of 125 Cal. App., 14 P.(2d) 102, 106):

"Situations are thus recognized which repel a strained construction of the statute.

"No logical distinction can be made between a temporary suspension of proceedings in the trial court, consequent upon a dismissal induced by fraud or mistake, and a suspension of the power of the trial court to proceed by reason of the pendency of an appeal. In either case, the action or proceeding is withdrawn from the cognizance of the court of first instance during the period of suspension."

The theory of this decision seems to us to be equally applicable to a situation where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile. In this connection, a useful analogy may be drawn from the rules on impossibility as a defense in the enforcement of contract obligations. Modern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense. See Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458, L.R.A. 1916F, 1; People v. Meyers, 215 Cal. 115, 8 P.(2d) 837; Restatement, Contracts, § 454.

Counsel for plaintiff, in prosecuting his appeal from the void order, and in taking no steps toward a futile trial in San Francisco, nor any futile steps toward a trial in Los Angeles, acted reasonably and with due regard to the interests of his client and the courts. There was no way in which he could secure a speedier decision by the appellate court. If the actual time on appeal had consumed the whole of the five-year period, could plaintiff have been held barred from going to trial? This would be an amazing miscarriage of justice, penalizing conduct entirely reasonable, and inducing procedure detrimental to the interests of both court and litigants. And the same is true where not the whole period, but a substantial part of it is consumed on appeal. We are therefore led to the conclusion that under the circumstances of this case, the time consumed by the appeal from the order changing venue is not to be counted as part of the five-year period specified by section 583 of the Code of Civil Procedure.

The alternative writ of prohibition heretofore issued is discharged, and the peremptory writ is denied.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.

9 Cal.2d 291

BROCK, State Director of Agriculture, et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

S. F. 15715.

Supreme Court of California.

July 26, 1937.

1. Agriculture 🔑1
Constitutional law 🔑62

Act giving director of agriculture power to enter into marketing agreements with shippers and distributors and to issue nondiscriminatory licenses to persons engaged in handling or distributing agricultural commodities, where there exists a federal agreement or license regulating such business and empowering director to prorate amount each shipper may ship, based upon findings of committee, was not unconstitutional as delegation of legislative power to director without sufficient standards to govern acts where purpose of act was clearly stated (Gen.Laws Supp.1935, Acts 143a, 145; Act 146, §§ 1, 2, 6, 6a; National Agricultural Adjustment Act, as amended, 7 U.S.C.A. § 601 et seq.; Const. art. 4, § 1).

2. Constitutional law 🔑60

It is valid to adopt existing statutes, rules, or regulations of Congress or another state, by reference; but attempt to make future regulations of another jurisdiction part of state law is generally held to be unconstitutional.

3. Constitutional law 🔑62

Where action taken by director of agriculture was under act empowering him to make marketing agreements and to issue licenses to producers, shippers, or distributors of agricultural commodities after proper notice and hearing, provision that regulations made by Secretary of Agriculture under National Agricultural Adjustment Act were applicable to intrastate transactions when and in so far as within standards specified in and for the act could not be considered as unwarranted delegation of legislative power where no federal regulation was involved (Gen.Laws Supp.1935, Act 146, § 5, subd. 1, § 6a; Const. art. 4, § 1).

4. Constitutional law 🔑60

Under act empowering director of agriculture, after notice and hearing, to enter into marketing agreements with and to issue licenses to persons engaged in producing shipping or distributing agricultural commodities, provision that every order, rule, or regulation under National Agricultural Adjustment Act hereafter made was applicable to all intrastate transactions when and in so far as within standards specified in and for the act was not unconstitutional as automatic incorporation by reference of future federal laws, since act only declared policy of making state regulation correspond with federal regulation under circumstances set forth in the act (Gen.Laws Supp.1935, Act 146, § 5, subd. (1), § 6a; Const. art. 4, § 1).

5. Constitutional law 🔑64

An act empowering director of agriculture to issue licenses to persons engaged in agricultural industry and providing that he should not make marketing agreements unless assented to in writing by persons engaged in agricultural industry according to requirements of corresponding federal marketing agreement, which is made for approval of 80 per cent. of such persons, was not invalid as delegating legislative authority to a majority group, where license could be issued without marketing agreement (Gen.Laws Supp.1935, Acts 143a, 145; Act 146, §§ 1, 2, 6, 6a; National Agricultural Adjustment Act as amended, 7 U.S.C.A. § 601 et seq.; Const. art. 4, § 1).

6. Constitutional law ⟹64

A statute is not invalid merely because it provides for consent of interested persons to the comtemplated regulation.

7. Constitutional law ⟹48

Act empowering director of agriculture to make marketing agreements and providing for licensing of persons engaged in agricultural industry where corresponding federal agreement of license exists, and providing that act should remain in force while federal regulation of any agricultural business exists, was not void as attempted adoption of regulations corresponding with illegal federal rules, where acts were based upon provisions different than those previously declared invalid, since under such circumstances court was bound to presume that present acts of federal officials under National Agricultural Adjustment Act were valid until declared otherwise by federal courts (Gen. Laws Supp.1935, Act 146, § 20a; National Agricultural Adjustment Act, as amended, 7 U.S.C.A. § 601 et seq.).

8. Injunction ⟹85(2)

Where objections to constitutionality of statutes enacted for purpose of regulating agricultural production and marketing were not sound, it was improper for court to enjoin director of agriculture from carrying provisions of act into effect (Gen.Laws Supp. 1935, Acts 143a, 145; Act 146, §§ 1, 2, 6, 6a).

THOMPSON, J., dissenting.

In Bank.

Application for a writ of prohibition by A. A. Brock, State Director of Agriculture, against the Superior Court in and for Los Angeles County and Ruben S. Schmidt, Judge thereof.

Writ of prohibition issued.

U. S. Webb, Atty. Gen., and Alberta Belford and Walter L. Bowers, Deputy Attys. Gen., for applicants.

Ivan G. McDaniel, of Los Angeles, for applicants other than A. A. Brock, W. H. Wright, Theodore Macklin and C. H. Carey.

Everett W. Mattoon, County Counsel, A. Curtis Smith, Deputy Co. Counsel, Erwin H. Haas, and Harry J. McClean, all of Los Angeles, for respondents.

LANGDON, Justice.

This is an application for a writ of prohibition to compel the respondent superior court to refrain from further proceedings directed toward the enforcement of an injunction. The issue involved is the constitutionality of the California Agricultural Adjustment Act of 1935 (Stats.1935, cc. 307, 416, pp. 1032, 1468, Deering's Gen.Laws, 1935 Supp., Act 146, p. 480), and the validity of proceedings taken thereunder to regulate the marketing of oranges and grapefruit within the state.

Three statutes were enacted by our Legislature in 1935 for the purpose of regulating agricultural production and marketing. The Agricultural Prorate Act (Stats.1935, c. 471, p. 1526 (amended St.1935, p. 2087), Deering's Gen.Laws, 1935 Supp., Act 143a, p. 373) regulates production of agricultural products within the state of California. The Agricultural Marketing Agreement Act (Stats.1935, c. 677, p. 1856, Deering's Gen.Laws, 1935 Supp., Act 145, p. 471) regulates marketing or shipping of agricultural products within the state where there is no corresponding federal regulation. The Agricultural Adjustment Act, now before us, regulates marketing of agricultural products within the state where there is federal regulation of interstate shipment of the products, and the purpose of the act is to provide a regulation of intrastate commerce which will be correlated with the corresponding regulation of interstate commerce in the same commodities.

Section 1 of the Agricultural Adjustment Act declares that there exists a state and national emergency productive of widespread agricultural collapse, vitally affecting the public welfare; and that it is the policy of the state to co-operate with and assist the national government in promoting the rehabilitation of agriculture. Section 2 states the purposes of the act, among them being the restoration of farm prices to a level which will give a purchasing power equivalent to that during the period of 1909 to 1914, and the elimination of waste resulting from overproduction, disorderly marketing and unfair methods of competition. Section 6 permits persons or groups to enter into marketing agreements for any particular branch of the agricultural industry, or for any agricultural product or commodity; but no such agreement is subject to the provisions of the act until approved by the State Directors of Agriculture. Section 6a provides that, in order to carry out the purposes of the act, the state director of agriculture shall have power, after reasonable notice and opportunity for hearing, to enter into marketing agreements with shippers and distributors, and to issue nondiscriminatory licenses to persons engaged in "producing, marketing, processing, packing, shipping, handling, or distributing, of any agricultural product or commodity or products thereof, or any competing product or commodity or products thereof." Such licenses are not to be issued unless there already exists "a corresponding Federal agreement or license regulating such business, trade or industry under the National Agricultural Adjustment Act." Likewise, no marketing agreement is to be approved unless it conforms with the terms of the federal marketing agreement.

Pursuant to the terms of the statute, the director gave notice of a hearing to be held in Los Angeles on October 9, 1935, upon a proposed license to regulate the shipment of oranges and grapefruit. From the evidence presented at the said hearing, the director determined that about 10 per cent. of the oranges and about 35 per cent. of the grapefruit grown in this state was marketed here; that the prices received by growers had, by reason of unrestricted marketing and resulting gluts and famines, greatly declined; that there exists a federal marketing agreement and order under the National Agricultural Adjustment Act as amended (7 U.S.C.A. § 601 et seq.) regulating the handling of oranges and grapefruit grown in California and Arizona and shipped in interstate commerce, designated Marketing Agreement No. 30, issued December 14, 1933, and Order No. 2, effective January 13, 1936; that the proposed license conformed to the standards fixed by the California act, and contained only such terms, provisions, methods, and procedure as the corresponding federal order, except in so far as differences were made necessary to restrict the license to intrastate commerce; and that the administrative bodies or officers provided for under the license included only those who hold corresponding positions under the federal order, save where they have refused to serve. These findings are in conformity with the statutory requirements.

The license, issued January 7, 1936, and effective January 14, 1936, provides that it shall be administered by the Growers Advisory Committee and the Distribution Committee which are administering the federal order. Each week, after findings by the committees, the director of agriculture determines the total amount of oranges or grapefruit which shall be shipped in intrastate commerce. He then prorates to each shipper the amount which he may ship, in proportion to the amount controlled by such shipper, and issues to each shipper an allotment showing such amount. Shipments in excess of allotments are punishable as misdemeanors, and are further subject to injunction and civil action. To determine the prorate base, each shipper is required to file with the Growers Advisory Committee an estimate of the amount of fruit controlled by him as owner or under contract. The proportion of fruit controlled by the shipper to the total crop of that kind of fruit is then ascertained.

It is to be noted that the act which is before us, and the license issued thereunder does not limit production, and does not establish prices or marketing practices or methods. Its sole object is to limit the total shipments of particular agricultural commodities.

On or about May 7, 1936, a group of shippers filed a complaint in the superior court of Los Angeles county, against the director and the members of the Advisory and Distribution Committees, applicants herein, to enjoin the enforcement of the act and the license, on the ground of unconstitutionality. An order to show cause was issued, and eventually, after hearing, a temporary injunction was issued by the respondent superior court. On July 8, 1936, applicants moved to dissolve the injunction, and the motion was denied. Thereafter they sought a writ of prohibition from this court to restrain the respondent superior court from proceeding to enforce its injunction. An alternative writ was issued. Thereafter the parties entered into a stipulation eliminating issues of fact, and agreeing that the following were the sole issues: (1) The constitutionality of the statute; (2) the validity of existing federal regulations under the National Agricultural Adjustment Act of 1933 as amended (7 U.S.C.A. § 601 et seq.); (3) the validity of the prescribed allotments with respect to the objection that they were frequently less than carload lots and made it impractical, costly, and inefficient to market fruit or operate a packing plant, thus depriving the complaining shippers of the right to full enjoyment of their properties and businesses.

The chief basis of attack on the statute is that it provides for an unlawful delegation of legislative power, in violation of article 4, section 1, of the California Constitution. Three kinds of unconstitutional delegation are asserted by respondents: (1) To the director of agriculture; (2) to the federal Congress and the Secretary of Agriculture; and (3) to a group of persons in an industry.

[1] The first objection is that the director of agriculture, in his licensing activities, is given legislative power without any sufficient standard or control to govern his acts. A brief examination of the act is a sufficient answer to this objection. A number of purposes will be found clearly stated in section 2; namely, the prevention of unnecessary waste of agricultural wealth through disorderly marketing, the protection of the consumer while enabling producers to obtain a fair and reasonable return, and the raising of the price level to a specified point. It is provided that there shall be equal opportunities to growers and producers in the available markets, and that there must be a corresponding federal regulation with like terms, and an administrative agency with the same personnel as the federal agency. The director must find, after notice and hearing, that all the above conditions exist, before he may issue the licenses. The method of prorating is clearly set forth. There is not, therefore, any vesting of an uncontrolled discretion in the director, as is condemned by such cases as Panama Refining Company v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, and Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. The legislative standards are far more detailed and definite than those considered sufficient in People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3, where the Fish and Game Commission was given power to grant revocable permits to take fish for reduction purposes, provided that it appeared to the commission that the taking would not tend to deplete the species, or result in waste or deterioration of the fish. Many other cases may be found supporting the validity of standards not more definite than those provided in the present statute. The following decisions comprehensively review and discuss the leading cases: Agricultural Prorate Commission v. Superior Court, 5 Cal.(2d) 550, 568, 55 P.(2d) 495; Hampton, Jr., & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; Tarpey v. McClure, 190 Cal. 593, 213 P. 983; Metropolitan Water District v. Whitsett, 215 Cal. 400, 10 P.(2d) 751; People v. Globe Grain & Milling Co., supra; United States v. Edwards (D. C.) 14 F.Supp. 384, 392. See, also, for an exhaustive study of the federal decisions, Cousens, "Delegation of Legislative Power," 33 Mich.L.Rev. 512; and notes, 24 Cal.L.Rev. 184; 19 Cal.L.Rev. 448; 15 Cal.L.Rev. 408.

The strongest cases in favor of respondents are Van Winkle v. Fred Meyer, Inc., 151 Or. 455, 49 P.(2d) 1140, holding invalid an Oregon statute providing for marketing agreements regulating production, trade practices, and prices; and Uhden, Inc., v. Greenough, 181 Wash. 412, 43 P.(2d) 983, 98 A.L.R. 1181, holding invalid a somewhat similar Washington statute. While there are a number of distinctions between those statutes and our present act, we deem it unnecessary to consider them in detail, for in our opinion the California act is valid under the principles established by our own decisions and by the United States Supreme Court. Our recent decision in Agricultural Prorate Commission v. Superior Court, supra, was concerned with the Agricultural Prorate Act of 1933, which provided for limiting of production of agricultural commodities by proration. The declarations of purpose, the delegation of power, and the standards controlling the discretion of the commission intrusted with the administration of the act were substantially similar to those found in the present statute. Upon a review of the authorities, including the Oregon and Washington cases cited above, we held the delegation valid. The same conclusion must be drawn in the instant case.

[2] The second contention is that, by its provision for correlating state and federal regulation, the act delegates legislative power to Congress and the Secretary of Agriculture. The provision particularly criticized is that of section 5, subdivison (1), that every order, rule, or regulation of the Secretary of Agriculture under the National Agricultural Adjustment Act, "heretofore or hereafter made," is applicable to all intrastate transactions within the state of California, "when and in so far as within the standards specified in and

for this act." It is, of course, perfectly valid to adopt existing statutes, rules, or regulations of Congress or another state, by reference; but the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative power. See In re Burke, 190 Cal. 326, 212 P. 193; Santee Mills v. Query, 122 S.C. 158, 115 S.E. 202; and note, 34 Colum. L.Rev. 1077, 1084.

[3, 4] We do not believe it appropriate to consider whether section 5 of the act constitutes an unlawful delegation of power in this respect, for the reason that this section is not involved in the proceedings herein. There has been no attempt to declare or enforce any federal regulation as our law merely by reason of its promulgation by federal authority. The proceedings here were taken under section 6a of the act, and under said section, as pointed out above, the director himself must make the regulation, and must himself issue the license. And it is not provided that he must without question issue the license whenever a federal regulation of the same commodities exists, and in the same terms. On the contrary, he must hold a hearing to determine whether the federal regulations tend to carry out the purposes of the California act, and conform to its standards. Only if he first makes this finding is he to issue a similar license, and even then he is authorized and required to make such changes as are necessary to confine the regulation to intrastate commerce. There is, therefore, no automatic incorporation by reference of future federal laws, but a declared policy of making our law correspond with federal regulation under circumstances set forth in our statute, and an adequate, constitutional means for carrying that policy into effect. The decisions upholding the so-called retaliatory license or tax measures, in which some foreign law is the contingency upon which they become operative, are ample authority for the present legislation. See People v. Fire Ass'n of Philadelphia, 92 N.Y. 311, 44 Am.Rep. 380; Clay v. Dixie Fire Ins. Co., 168 Ky. 315, 181 S.W. 1123; note, 34 Colum.L.Rev. 1077, 1085.

The third assertion of invalidity is based upon the provision of section 6a that the director shall not enter into a marketing agreement unless it is assented to in writing by persons engaged in the industry, according to the requirements of the corresponding federal marketing agreement. It is argued that under the federal statute, section 8a, provision is made for the approval of 80 per cent. of such persons, and respondents contend that there is, therefore, a delegation of authority to a majority group, or even a minority group where 80 per cent. of the industry may be represented by a co-operative marketing association. The cases principally relied upon in this connection are Van Winkle v. Fred Meyer, Inc., 151 Or. 455, 49 P.(2d) 1140, supra, and Gibson Auto Co. v. Finnegan, 217 Wis. 401, 259 N.W. 420.

[5, 6] A simple answer is that the statute does not require a state marketing agreement as a prerequisite to a state license, and the director has power to make a license effective without any such approval. It is the federal regulation that is important, and that must be followed by the director, where not in conflict with the standards of our own law, regardless of approval or disapproval of any marketing agreement. But, irrespective of this fact, a statute is not invalid merely because it provides for consent of interested persons to the contemplated regulation. Local option statutes are obvious examples. See Ex parte Beck, 162 Cal. 701, 124 P. 543. The federal statute, as already pointed out, contains a provision for approval of producers or handlers, and no constitutional defect was found therein by the federal District Court for the Southern District of California. United States v. Edwards, 14 F.Supp. 384. A similar provision for approval is found in our Prorate Act, upheld in Agricultural Prorate Commission v. Superior Court, 5 Cal. (2d) 550, 55 P.(2d) 495. The Wisconsin case of Gibson Auto Co. v. Finnegan, supra, was decided on the theory that the power to initiate the legislation establishing rules of fair competition had been delegated to private persons, a majority of a trade or industry. A later amendment of the statute, vesting the power to declare the regulations in the state executive was held to cure the defect. In re State ex rel. Attorney General (Tavern Code Authority), 220 Wis. 25, 264 N.W. 633, 635; see notes, 11 Wis.L.Rev. 430; 24 Georgetown L.J. 1019. The same defect was the basis of the decision in Van Winkle v. Fred Meyer, Inc., supra, and this case is consequently readily distinguishable from the instant case.

[7] Another ground of attack by respondents is that our statute necessarily presupposes the existence of a constitutional federal statute and valid regulations established thereunder; that the Federal Agricultural Adjustment Act has been held unconstitutional; and that the attempted adoption of regulations corresponding with illegal federal orders is invalid.

Section 20a of the California act provides that it shall remain in force "while there exists any Federal regulation of any agricultural business." There is now, in fact, such federal regulation. The case of United States v. Butler, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914 relied upon by respondents, held unconstitutional the processing taxes sought to be collected under the Federal Agricultural Adjustment Act as part of the plan of crop control. The court confined its opinion to the provisions of the act then before it. Until the federal courts have finally determined the scope of the decision in the Butler Case, we are bound to presume that the present acts of federal officials under federal law are valid, based as they are upon provisions of the statute different from those under review in the Butler Case. It is true that in United States v. David Butrick Co., 15 F.Supp. 655, the federal District Court in Massachusetts held that the entire Agricultural Adjustment Act fell as a result of the Butler Case; but the opposite conclusion was later reached by the federal District Court in California in a subsequent hearing in the case of United States v. Edwards, 16 F.Supp. 53 (see, also, Id., 14 F.Supp. 384, supra), affirmed, Edwards v. United States (C.C.A.) 91 F.(2d) 767. In that case the court held the provisions for regulation of marketing in interstate commerce severable from the rest of the statute, and a proper exercise of the commerce power. We therefore are of the opinion that we cannot declare the federal regulations void, and it is entirely proper to correlate our regulations with them.

The final assertion by respondents that the allotments are sometimes so small as to make it difficult to operate their businesses merely described the occasional individual inconvenience that comes from regulation of a group, and it does not present any serious question of constitutionality.

[8] None of the objections to the statute is sound, and it was therefore improper to enjoin the applicants from carrying its provisions into effect in the manner hereinabove described.

Let a peremptory writ of prohibition issue as prayed.

We concur: CURTIS, J.; SEAWELL, J.; SHENK, J.; EDMONDS, J.

I dissent: THOMPSON, J.

9 Cal.2d 508

PEOPLE v. BIGGS et al.

Cr. 4100.

Supreme Court of California.

Aug. 24, 1937.

Rehearing Denied Sept. 23, 1937.

1. Criminal law ⟹1200

The Legislature may constitutionally impose a heavier penalty for a subsequent conviction despite a prior pardon.

2. Criminal law ⟹1211

Pardon ⟹9

A "pardon" exempts the individual from punishment which law inflicts for the crime which he has committed and, generally, it also removes any disqualification or disabilities which would ordinarily have followed from the conviction, but a person remains a convicted criminal even though pardoned as respects whether a conviction may be deemed a prior conviction after pardon within statutes prescribing increased punishment for those previously convicted of crime (Pen.Code, §§ 666, 668; § 644, as amended by St.1935, p. 1699; § 667, as amended by St.1935, p. 2121; § 1168, as amended by St.1935, p. 1700).

[Ed. Note.—For other definitions of "Pardon," see Words & Phrases.]

3. Criminal law ⟹1209

Statutes imposing increased punishment for prior offenders do not punish the prior offense but increase the punishment for the second offense (Pen.Code, §§ 666, 668; § 644, as amended by St.1935, p. 1699; § 667, as amended by St.1935, p. 2121; § 1168, as amended by St.1935, p. 1700).

4. Criminal law ⟹1202(1)

A defendant who had been pardoned after conviction of felonies in Texas sustained "prior convictions" within statutes prescribing increased punishment for those previously convicted of crime and hence his prior conviction could be considered in determining his punishment after a conviction for grand theft (Pen.Code, §§ 666, 668; § 644, as amended by St.1935, p. 1699; § 667, as amended by St.1935, p. 2121; § 1168, as amended by St.1935, p. 1700).

[Ed. Note.—For other definitions of "Prior Conviction," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Martin V. Biggs and Henry C. Groseclose were prosecuted for an offense and second-named defendant was convicted of grand theft and found to have been twice previously convicted of a felony, and he appeals.

Affirmed.

Prior opinion, 65 P.(2d) 75.

R. A. Newell and Hugh G. Maddox, both of Long Beach, for appellant Henry C. Groseclose.

U. S. Webb, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Clarence S. Hunt, Deputy Dist. Atty., both of Los Angeles, for the People.

LANGDON, Justice.

This is an appeal from a judgment and order denying appellant's motion for new trial, after conviction of grand theft, with two prior convictions of felony.

Defendant and appellant Groseclose conspired with defendant Biggs and one James Bridger to stage a purported automobile accident in order to defraud several insurance companies. They succeeded in carrying out their object, and appellant collected substantial sums on two accident policies, and a further substantial sum by settlement with the insurance carrier which had insured defendant Biggs, the driver of the car, against public liability. The evidence was clearly sufficient to establish the commission of the offenses, and need not be reviewed here. Two minor objections are raised by appellant: Asserted insufficiency of the corroboration of the testimony of the accomplice Bridger, and alleged impropriety in permitting amendment of the information to conform to proof as to the date of the commission of the offense and the sum of money involved. There is no merit in either point and discussion of them is unnecessary.

A question of grave importance, and one which has never been decided in this state, is the main issue on this appeal, and it was in order to give full consideration to this question that we granted a hearing after decision by the District Court of Appeal, Second Appellate District. Appellant was twice previously convicted of felonies in the state of Texas. These prior convictions were charged and proved at the trial. As a result of such proof, under our law appellant was adjudged an habitual criminal and sentenced to life imprisonment. See Pen.Code, § 644 (as amended by St.1935, p. 1699). But appellant moved to strike from the information all reference to these convictions, and after denial of his motion introduced into evidence, proof of full pardons by the Governor of Texas for each of these prior offenses. He contended that because of the pardons, the prior convictions could not be considered in determining whether he was an habitual criminal. The trial court and the District Court of Appeal held contrary to his view, and the correctness of this holding is the issue now before us. In brief, the question is whether a conviction may, after pardon of the offender, be deemed a prior conviction within the meaning of our statutes prescribing increased punishment for habitual criminals or those previously convicted of crime. We are of the opinion that it may.

[1] Our statutes, like most of the acts in other states, are silent on this point. They refer simply to prior "convictions" or to persons previously "convicted," making no other qualification or explanation save that the defendant must have served a term of imprisonment therefor. See Pen. Code, §§ 644 (as amended by St.1935, p. 1699), 666, 667 (as amended by St.1935, p. 2121); see, also, sections 668, 1168 (as amended by St.1935, p. 1700) which do not require service of a term of imprisonment. This fact would in itself appear to be an answer to appellant's contention, for if he has suffered prior convictions, he comes within the classification of persons who are to be subjected to heavier punishment for subsequent offenses, and must be so punished. It is immaterial that the statutes do not expressly refer to persons pardoned after conviction, since by failure to exclude them, they are obviously included within the general provisions. This is a necessary

conclusion from the language of the statutes, and it is determinative of the present case unless there is something in the nature of a pardon which compels a different interpretation. It should be borne in mind, in this connection, that the question is solely one of the legislative intent; the constitutional power of the Legislature to impose a heavier penalty for the subsequent conviction, despite a prior pardon, is settled. Carlesi v. New York, 233 U.S. 51, 34 S.Ct. 576, 58 L.Ed. 843.

Appellant relies largely upon a number of declarations by various authorities as to the general effect of a pardon. The following are examples: "The power to pardon is something more than the power to release from servitude. 'Pardon' is the remission of guilt, amnesty, oblivion, or forgetfulness." People v. Hale, 64 Cal.App. 523, 533, 222 P. 148, 152. "The effect of a pardon (under the rules of the common law) is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains a pardon; it gives him a new credit and capacity." People v. Bowen, 43 Cal. 439, 442, 13 Am.Rep. 148, quoting from Blackstone's Commentaries. "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. * * * If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." Ex parte Garland, 4 Wall. 333, 380, 18 L.Ed. 366. Similar expressions may be found in numerous other cases.

[2] But the somewhat extravagant language occasionally employed must be contrasted with the actual decisions of the courts. It is universally established that a pardon exempts the individual from the punishment which the law inflicts for the crime which he has committed; and generally speaking, it also removes any disqualifications or disabilities which would ordinarily have followed from the conviction. To say, however, that the offender is "a new man," and "as innocent as if he had never committed the offense," is to ignore the difference between the crime and the criminal. A person adjudged guilty of an offense is a convicted criminal, though pardoned; he may be deserving of punishment, though left unpunished; and the law may regard him as more dangerous to society than one never found guilty of crime, though it place no restraints upon him following his conviction. The criminal character or habits of the individual, the chief postulate of habitual criminal statutes, is often as clearly disclosed by a pardoned conviction as by one never condoned. The broad generalizations quoted above are, if taken too literally, logically unsound as well as historically questionable. See Williston, Does a Pardon Blot Out Guilt? 28 Harv.L.Rev. 647; People v. Carlesi, 154 App.Div. 481, 139 N.Y.S. 309; 13 Columb.L.Rev. 418; In re Lavine, 2 Cal.(2d) 324, 41 P.(2d) 161; 4 Cal.L. Rev. 236.

[3] Statutes imposing increased punishment for prior offenders are not new, and they have been before the courts on many occasions. The distinction pointed out above, between the offense and the offender, has been repeatedly emphasized. One of the apt illustrations is found in the contention that these statutes are unconstitutional, as ex post facto laws or for some other reason. The uniform answer has been that it is the second or subsequent offense which is punished, not the first; and that in determining the nature of the penalty to be inflicted, the Legislature is justified in taking into consideration the previous criminal conduct of the defendant. See In re Rosencrantz, 205 Cal. 534, 271 P. 902; McDonald v. Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542; notes, 58 A.L.R. 20; 11 Minn.L.Rev. 561.

With respect to the precise question before us, namely, the effect of a prior conviction which has been pardoned, the courts are in conflict; but perhaps the weight of authority, and certainly of critical opinion, is to the effect that the pardon is immaterial, and that the defendant may be adjudged a prior offender and given the increased punishment as such. See People v. Carlesi, 154 App.Div. 481, 139 N.Y.S. 309, affirmed 208 N.Y. 547, 101 N.E. 1114; Id., 233 U.S. 51, 34 S.Ct. 576, 58 L.Ed. 843; People v. Murphy, 244 App.Div. 834, 279 N.Y.S. 762; Mount v. Commonwealth, 2 Duv. [63 Ky.] 93; Herndon v. Commonwealth, 105 Ky. 197, 48 S.W. 989, 88 Am. St.Rep. 303; State v. Edelstein, 146 Wash. 221, 262 P. 622; 16 C.J. 1342, § 3157; notes, 58 A.L.R. 20, 49; 13 Columb.L.Rev. 418; 14 Minn.L.Rev. 293; 78 U.Pa.L.Rev. 561; 28 Harv.L.Rev. 647, 655; 41 Harv.

L.Rev. 918; 5 Fordham L.Rev. 166; 3 So. Cal.L.Rev. 438; 22 Journ. Crim. Law 122. As the court states, in People v. Carlesi, supra, 154 App.Div. 481, 139 N.Y.S. 309, 312: "The pardon of this defendant did not 'make a new man' of him. It did not 'blot out' the fact or the record of his conviction. * * * The pardon in this case merely restored the defendant to his civil rights. If it had been granted before his term of imprisonment had been served, it would also have relieved the defendant of that. But it did not obliterate the record of his conviction or blot out the fact that he had been convicted. * * * It relieved the defendant of the consequences which the law attached to his offense. But the defendant is to be punished now solely in consequence of his second offense. The fact of the former conviction is an element merely in determining the criminality of the second offense. * * * The Legislature of this state has said that one who commits a crime after having been convicted of another crime is a greater offender than as though he had not previously been convicted, and the punishment inflicted is solely for the second offense to which a greater degree of criminality is thus attached. That degree of criminality is not at all lessened by the fact of a pardon which assumes his guilt, remits the punishment, and affords him an opportunity to become a law-abiding citizen. It was solely within the province of the Legislature to attach such greater criminality to the second offense from the mere fact of a conviction for a first, and the executive by the exercise of the pardoning power could no more interfere with that exercise of legislative power than the Legislature could interfere with the power to pardon." And in Mount v. Commonwealth, supra, the court said: "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more. * * * The augmented punishment is for the last, and not at all for the first offense; and, of course, a pardon of the first could, in no way or degree, operate as a pardon of the last offense or remission of any portion of the punishment denounced for the perpetration of it." It may also be observed, in the words of one commentator, that "this view would in the majority of cases effectuate the intention of the executive in forgiving the first offense, for though at the time of granting the pardon he evidently considered the offender worthy of restoration to his civil rights, he would undoubtedly have been of a different opinion had he suspected that the applicant for clemency possessed habitually criminal tendencies." Note, 13 Columb. L.Rev. 418, 421.

The other view, holding that the pardoned offense cannot be considered, is based upon the literal application of the theory that the pardon "blots out guilt," and "wipes out the offense," which is then regarded as never having been committed. See Edwards v. Commonwealth, 78 Va. 39, 49 Am.Rep. 377; State v. Martin, 59 OhioSt. 212, 52 N.E. 188, 43 L.R.A. 94, 69 Am.St.Rep. 762; Tucker v. State, 14 Okl.Cr. 54, 167 P. 637; State v. Lee, 171 La. 744, 132 So. 219; Scrivnor v. State, 113 Tex.Cr.R. 194, 20 S.W.(2d) 416.

Our own decisions do not, despite such general remarks as we have already quoted, accept this extreme view in its entirety. Thus, a witness may be impeached by proving his conviction of a felony, though he may offer evidence of the pardon in rehabilitation. People v. Hardwick, 204 Cal. 582, 269 P. 427, 59 A.L.R. 1480; see 16 Cal.L.Rev. 161; 1 So.Cal.L.Rev. 200; 2 Wigmore, Evidence (2d Ed.) §§ 980, 1116. And a pardon of a convicted felon, as recently declared by this court, "does not restore his character," and "does not obliterate the act itself." "The very essence of a pardon is forgiveness or remission of penalty. State v. Hazzard, 139 Wash. 487, 247 P. 957, 47 A.L.R. 538. It implies guilt, and does not wash out the moral stain." In re Lavine, 2 Cal.(2d) 324, 329, 41 P.(2d) 161, 163. In the Lavine Case, supra, wherein an attorney disbarred for a felony conviction sought reinstatement after securing a full pardon, the application was held insufficient in the absence of a showing of moral rehabilitation. We pointed out that the broad language of Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366, supra, has been greatly limited and sometimes repudiated by later cases. See, also, 4 Cal.L.Rev. 236.

[4] After a full consideration of the expressions of the courts, both in this and other jurisdictions, we are satisfied that the contention of appellant cannot be sustained. We are unable to see how the pardon, relieving the offender from the effects or disabilities of his first crime, can in addition prevent the normal application of the statute punishing him for a subsequent offense. In its provisions for increased punishment for prior offenders, the Legislature could doubtless make an exception in favor of persons pardoned, if it had reason to believe

that such persons, though found guilty of a subsequent offense, were no more dangerous to society, because no more criminal in character, than persons first convicted. It has not seen fit to do so, and unless it does, this court cannot usurp the legislative function of determining the appropriate punishment for offenders coming within the statutory classifications.

We leave open the question, not presented by this case, whether a different result might be reached if the defendant should establish, by satisfactory proof, that his pardon was granted after an investigation and determination of his innocence of the crime charged. See People v. Dutton (Cal.Sup.) 71 P.(2d) 218, this day filed. Nor do we express any opinion on the further point, not raised herein, whether the trial court in such circumstances might exercise the discretion conferred upon it by the 1935 amendment to section 644 of the Penal Code, and adjudge the defendant not to be an habitual criminal.

The judgment and order are, and each is, affirmed.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; NOURSE, Justice pro tem.

I concur in the judgment: EDMONDS, J.

---

9 Cal.2d 505

PEOPLE v. DUTTON.

Cr. 4110.

Supreme Court of California.

Aug. 24, 1937.

Rehearing Denied Sept. 23, 1937.

1. Criminal law 🔑1202(1)

A defendant who had been pardoned after conviction of a felony in Wisconsin, had sustained a "prior conviction" within statutes requiring the imposition on a defendant who has sustained a prior conviction of a punishment heavier than that prescribed for a first offender and rendering such defendants ineligible for probation (Pen.Code, § 1168, as amended by St.1935, p. 1700; § 1203, as amended by St.1935, p. 1706).

[Ed. Note.—For other definitions of "Prior Conviction," see Words & Phrases.]

2. States 🔑5½

Full faith and credit was not denied to act of Wisconsin Governor in pardoning a defendant convicted in Wisconsin of a felony by conduct of California court when assessing punishment of pardoned person for offense committed in California by increasing the punishment because of the prior conviction in Wisconsin since the California court was punishing defendant for the second offense only (Pen.Code, § 1168, as amended by St.1935, p. 1700; § 1203, as amended by St.1935, p. 1706; Const.U.S. art. 4, § 1).

3. Constitutional law 🔑250

A defendant whose punishment was increased because of a prior conviction of a felony in Wisconsin notwithstanding defendant had been pardoned for Wisconsin offense was not denied equal protection of the laws (Pen.Code, § 1168, as amended by St. 1935, p. 1700; § 1203, as amended by St. 1935, p. 1706).

4. Criminal law 🔑1202(1)

Statute relating to pardons by Governor of California and purporting to remove disabilities resulting from the offense pardoned did not apply so as to relieve a defendant who had been convicted of a felony in Wisconsin and pardoned by governor of that state from heavier punishment prescribed for a person who has suffered a prior conviction of a felony (Pen.Code, § 1168, as amended by St.1935, p. 1700; § 1203, as amended by St.1935, p. 1706; St. 1933, p. 2476).

5. Criminal law 🔑1209

Statutes imposing increased punishment for prior offenders do not punish the prior offense but provide an appropriate penalty for the person who, after commission of one crime, commits another (Pen.Code, § 1168, as amended by St.1935, p. 1700; § 1203, as amended by St.1935, p. 1706).

6. Criminal law 🔑1202(1)

That a defendant who had been pardoned for commission of a felony had urged his innocence of the crime charged as ground for pardon in his application therefor would not preclude additional punishment on the defendant's being convicted a second time for another offense because of his prior conviction since the defendant's innocence was not established by his request for a pardon on that ground (Pen.Code, § 1168, as amended by St.1935, p. 1700; § 1203, as amended by St.1935, p. 1706).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Charles Dutton was convicted of the violation of Penal Code, § 476a, relating to the issuance of bank checks with intent to defraud and was found to have been previously convicted of a felony, and he appeals.

Affirmed.

Prior opinion, 65 P.(2d) 1339.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

LANGDON, Justice.

Defendant was charged with the violation of section 476a of the Penal Code, and with a prior conviction of forgery, a felony, in Wisconsin. He pleaded guilty to the crime charged, but sought to avoid the effect of the prior conviction by proof of a pardon given by the Governor of the state. The court found that he had suffered a prior conviction, and in his appeal, defendant attacks this finding, which, if it stands, requires the imposition upon defendant of a punishment heavier than that prescribed for a first offender, and renders him ineligible for probation. Pen.Code, §§ 1168 (as amended by St. 1935, p. 1700), 1203 (as amended by St. 1935, p. 1706).

[1] This appeal presents the same issue considered by us in People v. Biggs et al., 71 P.(2d) 214, this day decided. In accordance with the conclusion reached in that opinion, we hold that despite his pardon, defendant has suffered a prior conviction within the meaning of the above-cited sections of the Penal Code.

[2] Defendant in the instant case advances several contentions not made in the Biggs Case. He urges, first, that the trial court denied full faith and credit to the act of the Governor of Wisconsin, in violation of article 4, § 1, of the Federal Constitution. No authority is cited to support the remarkable assertion that California, in determining the appropriate punishment for a person convicted of crime in this state, is denying effect to acts of the chief executive of Wisconsin. He pardoned the defendant for the first offense; this state punishes him for the second offense only, and full faith and credit is not involved.

[3] The second contention, that defendant is denied equal protection of the laws, is likewise made without citation of authority or discussion. It is obviously without merit, and, moreover, the constitutionality of just such an application of a statute punishing subsequent offenders is definitely established. Carlesi v. New York, 233 U.S. 51, 34 S.Ct. 576, 58 L.Ed. 843.

[4, 5] Defendant next calls to our attention the act of 1933 (Stats.1933, p. 2476) providing that where a full pardon has been granted by the Governor of this state, "it shall operate to restore to such convicted person, all the rights, privileges and franchises of which he has been deprived in consequence of said conviction or by reason of any matter involved therein." The relevancy of this statute is not disclosed. It expressly applies only to pardons given by the Governor of this state, and it purports simply to remove disabilities resulting from the offense. As we have pointed out in the Biggs Case, the increased punishment provided for subsequent offenders is not an additional disability attaching to the first offense, but an appropriate penalty for the person who, after conviction of one crime, commits another.

[6] Defendant, during pendency of his case before the District Court of Appeal, Second Appellate District, Division 1, sought to present additional evidence to that court, purporting to show that in his application to the Governor of Wisconsin for a pardon, he urged his innocence of the crime as the ground. That court denied his request, and its ruling is unquestionably correct, for even if the fact of innocence be relevant in this situation (as to this question, see infra), it does not follow that the defendant's innocence is established by his request for a pardon on that ground.

Whether under any circumstances the pardoned defendant can bring himself outside the scope of the subsequent offender statutes by proof relating to his innocence of the crime is a difficult question which we need not now consider. There is little mention of this point in the reported cases or law review discussions which we have examined. See 14 Minn.L.Rev. 293, 294; 41 Harv.L.Rev. 918; 78 U.Pa.L.Rev. 561, 562. This is perhaps due in part to the fact that the chief executives of the states seldom have either facilities or procedure for the performance of the quasi judicial task of determining guilt or innocence of convicted criminals seeking a pardon. Moreover, executive clemency is probably more frequently granted on the theory that the pardoned felon has expiated his offense, rather than that he was never guilty of it. See 2 Wigmore, Evidence, § 1116, p. 636. The problem of proof, therefore, in cases where it is asserted that clemency was granted because of a determination of innocence, would appear to present a formidable obstacle. We mention this point only to the end that it shall not be deemed foreclosed by our present decision. It may be that upon fuller consideration it will appear to be a question for legislative rather than judicial consideration, and perhaps part of the larger problem as to whether there should not be more complete judicial remedies for persons unjustly convicted of crime. See Williston, Does a Pardon Blot Out Guilt? 28 Harv.L.Rev. 647659.

The judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; NOURSE, Justice pro tem.

I concur in the judgment: EDMONDS, J.

* * *

9 Cal.2d 409

HERBERT v. LANKERSHIM et al.

L. A. 15762.

Supreme Court of California.

Aug. 23, 1937.

As Modified on Denial of Rehearing

Sept. 20, 1937.

1. Contracts ⇨99(1)

A person basing a claim upon a contract obtained from another as to whom she stands in a relation of trust and confidence will be presumed to have taken undue advantage of other person, unless it shall appear that such person had independent advice and acted on his own volition and with full comprehension of the results of his action.

2. Evidence ⇨573

In action on note payable one month after maker's death, testimony of expert witnesses with respect to writing on note could not be arbitrarily ignored or nullified by jury's verdict based upon testimony of a single witness as to execution of instrument, if testimony of such witness contained within itself such weaknesses as to render it too inherently improbable to support judgment for payee, particularly in view of necessity of scrutinizing facts carefully because of fiduciary relation between the parties.

3. Witnesses ⇨139(14)

In action against maker's estate on note payable one month after maker's death, given to reimburse payee "for her loving kindness and protection," payee being a party to action against the estate was precluded from testifying to any facts occurring before death of maker, under statute (Code Civ.Proc. § 1880, subd. 3).

4. Appeal and error ⇨1056(1)
Executors and administrators ⇨221(3)

In action on note payable one month after death of maker, executed by maker to reimburse payee "for her loving kindness and protection," alleged declaration of payee three weeks after execution of document when maker's effects were being moved, that she had "got free of the doddering old fool" and that she had kicked him out, was admissible and its exclusion was prejudicial error, where statement was inconsistent with plaintiffs' case, tended to impeach testimony of witnesses as to tender care of payee towards maker, and to show her state of mind.

5. Executors and administrators ⇨221(3)

In action on note for $500,000, payable one month after death of maker, given to reimburse payee "for her loving kindness and protection," considerable liberality in admission of any evidence which would shed light on relation existing between the parties should be indulged in view of nature of transaction.

6. Appeal and error ⇨1056(1)
Evidence ⇨272
Witnesses ⇨390

In action on note for $500,000 payable one month after death of maker, executed by aged maker to reimburse payee "for her loving kindness and protection," statement of payee, shortly after alleged execution of note, that she wanted her room changed to another floor than that on which maker was situated because of his habit of coming into her room and annoying her, was admissible as impeachment of testimony as to kind feelings which payee had for aged maker and as a statement against interest, and its exclusion was prejudicial error.

7. Executors and administrators 🔑221(3)

In action on note for $500,000 payable one month after maker's death, given to reimburse payee "for her loving kindness and protection," evidence with respect to reasonable value of the alleged services performed by payee was admissible (Civ.Code, §§ 1605, 1606).

8. Evidence 🔑313

Testimony coming from one's own written declarations is entitled to more serious consideration than is evidence of a secondary or hearsay character, as to what a person, since dead, said in life.

9. Executors and administrators 🔑221(2)

In action on note for $500,000 payable one month after death, given to reimburse payee "for her loving kindness and protection," burden was on payee to establish her claim of service.

10. Appeal and error 🔑1002

An appellate court will not interfere with the judgment entered by a fact finding body when there exists a substantial conflict in the evidence.

11. Appeal and error 🔑989

Rule that an appellate court will not interfere with judgment entered by a fact finding body when there exists a substantial conflict in the evidence does not relieve an appellate court of its duty of analyzing evidence in light of reason and human experience and giving consideration to motives and propensities which tend to influence human action in an effort to determine whether judgment is sustained by the evidence.

12. Appeal and error 🔑989

On appeal from a judgment for payee of note for $500,000, payable one month after death of maker, given to reimburse payee "for her loving kindness and protection," reviewing court was required to consider, in determining whether there existed a substantial conflict in the evidence, that the consideration was grossly disproportionate, and that a confidential relation existed between the parties, where there was no evidence of independent advice.

13. Appeal and error 🔑1002

In determining whether there is a conflict in the evidence, a mere conflict of words is not sufficient, but, as respects appellate review, the contrary evidence must be of a substantial character such as reasonably supports the judgment as applied to the peculiar facts of the case.

14. Appeal and error 🔑1001(1)

While the jurors are sole judges of facts, question as to whether there is substantial evidence in support of a plaintiff's case is one of law for the court, and, in the determination of such question, the credulity of the courts is not to be deemed commensurate with the facility or vehemence with which a witness swears.

15. Contracts 🔑96

Where relations of parties to a contract are intimate and highly confidential and donor has no independent advice and conveyance by him to other party is without valuable consideration or the consideration is grossly inadequate, court in which the issue as to validity of transaction is raised, must view it with the most scrutinizing jealousy.

16. Evidence 🔑313

Oral admissions by party to a contract who has since died which are not corroborated are the weakest kind of evidence (Code Civ.Proc. § 2061, subd. 4).

17. Executors and administrators 🔑221(1)

In action on note for $500,000 payable one month after death of maker, given to reimburse payee "for her kindness and protection," burden of establishing integrity of note was upon payee.

18. Evidence 🔑570

Expert evidence, like other kinds of evidence, cannot be arbitrarily disregarded.

19. Contracts 🔑53

The adequacy of consideration for a promise is generally immaterial in absence of fraud so long as the consideration is something of real value in eyes of the law.

20. Contracts 🔑99(3)

Rule that adequacy of consideration is immaterial in absence of fraud is not inflexible, and, where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount both at law and in equity to proof of fraud, oppression, and undue influence.

21. Contracts 🔑94(1)

Where a contract is unreasonable and unconscionable because of gross inadequacy of consideration, a court of law may give a party, who sues for breach of contract, only what he is equitably entitled to.

22. Contracts 🔑99(1)

Where mental weakness occurs in connection with inadequacy of consideration, the presumption of undue influence is strong.

23. Contracts 🔑99(1)

Where the parties to a contract stand in a confidential relation, inadequacy of price will raise a presumption of fraud.

24. Contracts 🔑99(3)

Inadequacy of consideration may be so excessively gross and unconscionable as to amount to conclusive evidence of fraud.

25. Appeal and error 🔑989

On appeal from judgment for payee on note for $500,000 payable one month after maker's death, given to reimburse payee "for her kindness and protection," gross inadequacy of consideration would be considered with evidence bearing upon the bona fides of the transaction.

26. Appeal and error 🔑1026

Where the reviewing court is in serious doubt as to sufficiency of evidence to support judgment, court must carefully consider errors complained of and order a retrial if such errors probably prejudiced the case of party against whom they were committed.

27. Appeal and error 🔑1170(1)

Constitutional provision that a cause shall not be reversed except for errors resulting in a miscarriage of justice would not apply where reviewing court is in serious doubt as to sufficiency of evidence to support judgment and errors probably prejudiced case of party against whom they were committed, unless the justice of the cause preponderates so heavily on side of prevailing party that none of the errors could have resulted in any miscarriage of justice (Const. art. 6, § 4½).

28. Appeal and error 🔑1170(1)

"Miscarriage of justice," as used in constitutional provision to effect that no judgment shall be reversed except for errors resulting in a "miscarriage of justice," has no hard and fast definition; but, where errors have been committed and it is doubtful that without such errors the verdict rendered would not have been given, then errors which otherwise would not be considered seriously prejudicial will require a reversal, and such rule applies in both civil and criminal cases (Const. art. 6, § 4½).

[Ed. Note.—For other definitions of "Miscarriage of Justice," see Words & Phrases.]

29. Gifts 🔑11

A note for $500,000 payable one month after death of maker, given to reimburse payee "for her kindness and protection," would not create an enforceable legal obligation if intended as a gift payable after death.

30. Executors and administrators 🔑202(1)

If note for $500,000 payable one month after death of maker, and given to reimburse payee "for her loving kindness and protection," was intended as compensation for services already rendered, statute providing in effect that an existing legal or moral obligation is a good consideration to an extent corresponding with extent of the obligation would be applicable irrespective of whether obligation was moral or legal (Civ.Code, § 1606).

31. Appeal and error 🔑1067
Executors and administrators 🔑451(3)

In action on note for $500,000 payable one month after death of maker, given to reimburse payee for her "loving kindness and protection," refusal of instruction, that payee would be limited to reasonable value of services, if consideration for instrument was past was prejudicial error, where jury could have found that services already rendered were sole consideration for note (Civ. Code § 1606).

32. Executors and administrators 🔑221(3)
Trial 🔑62(2)

In action on note for $500,000 payable one month after death of maker, given to reimburse payee "for her loving kindness and protection," declarations made by payee tending to rebut testimony of payee's witnesses to effect that she was kind to, sympathetic with, and considerate of maker, and was committed to his financial and personal welfare, were admissible as rebuttal evidence and as evidence going to payee's state of mind.

33. Executors and administrators 🔑451(3)

In action on note for $500,000 payable one month after death of maker, given to reimburse payee "for her loving kindness and protection," instructions with reference to confidential relations and the effect of gross inadequacy of consideration were insufficient.

34. Evidence 🔑91

Generally, the burden is on the party who introduces affirmative matter.

35. Trial 🔑234(7)

In action on note for $500,000 payable one month after death of maker, instruction relating to burden of proving undue influence, which was not qualified with respect to burden shifting to trustee to show that transaction was fair, and free from fraud or undue influence, if a confidential relation is shown to exist and transaction as to confiding party is inequitable and consideration grossly inadequate, was erroneous.

36. Contracts 🔑99(1)

Where a confidential relation exists and one of parties to relationship has shown great activity in procuring execution of instrument by which he greatly benefits, the activity of such person is an important factor for court or jury to consider in determining whether transaction was free from undue influence, and, when such relations exist, burden of showing that no undue advantage was taken shifts to party who benefits by transaction.

37. Trial 🔑267(1)

Where fundamentals are involved and there is no attempt on part of party proposing instructions to mislead court or jury by resorting to equivocally or ingeniously phrased requests, and it is necessary that jury be instructed on major subjects raised by the pleadings, trial court should give instructions requested on such subjects even if court is required to modify proposed instructions somewhat in order to make an acceptable presentation of the law.

38. Appeal and error 🔑1067

In action on note for $500,000 executed by aged maker to payee "for her loving kindness and protection," refusal of requested instructions, with respect to effect of inadequacy of consideration where a confidential relation exists and there is no independent advice and of effect of confidential relation between maker and payee, was prejudicial error, where jury was not adequately instructed on such major issues raised by pleadings, even if slight corrections in proposed instructions would be required to make a more acceptable presentation of the law, and also in view of instructions given at request of payee.

39. Appeal and error 🔑882(3)

Where a payee seeking to recover on instrument making $500,000 payable one month after death of maker did not advance theory of novation or account stated by pleading or raise such issues during the trial by evidence directed thereto or by any request for instructions framed to elucidate such theories, the payee could not urge such theories on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Suit by Irene Herbert, also known as Mrs. Edres Herbert, against Doria C. Lankershim and others. From an adverse judgment, the defendants appeal.

Reversed.

For prior opinion, see 52 P.(2d) 1007.

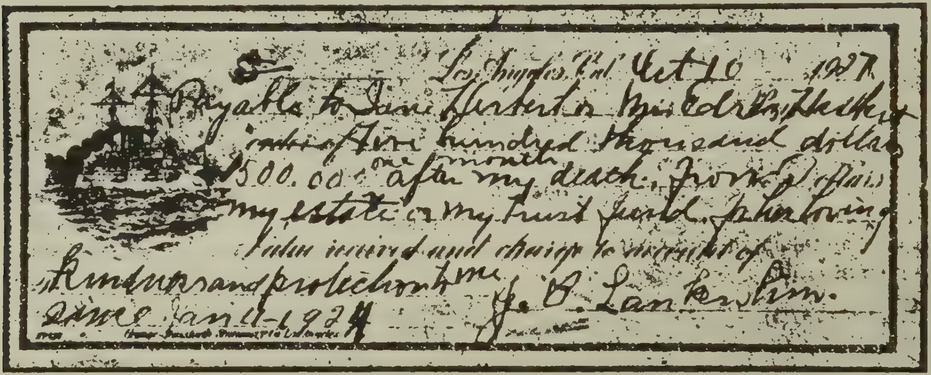
J. Wiseman Macdonald, Edward M. Auslender, and Loeb, Walker & Loeb, all of Los Angeles (Irving M. Walker, Milton H. Schwartz, and Herman F. Selvin, all of Los Angeles, of counsel) and John W. Preston, William J. Clark, and R. E. Parsons, all of Los Angeles, for appellants.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondent.

SEAWELL, Justice.

J. B. Lankershim, commonly known as Colonel Lankershim, a resident of the city and county of Los Angeles, State of California, died testate on October 16, 1931, at the city of Brooklyn, State of New York. He left a large and valuable estate. J. Wiseman Macdonald and Bank of America National Trust & Savings Association were appointed special administrators, with general powers as to the management of his estate.

By paragraph IV, count 1, of the complaint, denominated "Complaint—Money on Contract," plaintiff alleges: "That during the lifetime of said decedent and on the 10th day of October, 1927, said deceased J. B. Lankershim at and in the city of Los Angeles * * * in consideration of and on account of services rendered by plaintiff to and for J. B. Lankershim at his special instance and request, at divers times and occasions between January 4, 1924, and January 1, 1928, as a companion to him and in reading to him, administering to his wants; caring for his welfare; preparing food, meals and delicacies for him; attending to and caring for his wearing apparel and linen; aiding and assisting him in dressing and undressing and other activites of life; protecting him from artful and designing persons; consoling and sympathizing with him in times of worry, anxiety, displeasure and disappointment; nursing and administering to him in times of sickness and ill health; preparing and administering medicines and other treatment as directed by physicians or desired by him and otherwise caring for and administering to his comfort, contentment, welfare, happiness and pleasure, made executed and delivered a certain instrument in writing," which is marked "Exhibit 1," of which the accompanying photoprint is a facsimile:



Los Angeles Cal Oct 10 1927
Payable to Irma Herbert or Mrs Edres Herbert
[illegible] Five hundred thousand dollars
$500.00 one month after my death [illegible]
my estate or my trust fund [illegible]
[illegible] and charge [illegible]
kindness and protection to me
since Jan 4-1924
J. B. Lankershim.

Said instrument was presented to said special administrators for payment in the form of a creditor's claim on August 1, 1932, and it was rejected on August 25, 1932. It was made a part of count one by reference.

For a separate and second cause of action plaintiff alleges that the decedent for a valuable consideration made, executed, and delivered to plaintiff said written instrument and prays for judgment in the sum of $500,000, together with interest thereon as provided by law, and that the same be paid from the estate of J. B. Lankershim in due course of administration, and for appropriate relief in the premises.

In both counts of the complaint the kind of services and the period of time in which they were performed are definitely alleged.

Doria C. Lankershim and John I. Lankershim, children of the decedent, and J. Wiseman Macdonald, the executors named by the decedent in his will, were, in due course, substituted as parties defendant in the place and stead of said special administrators. J. Wiseman Macdonald was a trusted and close personal friend of the deceased and had been his legal and business advisor for many years prior to his death.

On October 10, 1927, the day the disputed instrument bears date, the decedent was seventy-seven years of age and the members of his family then living were his wife, Caroline A. Lankershim, and the son and daughter, answering defendants herein. The plaintiff was at said time the wife of Edres Herbert and was approximately thirty-eight years of age.

Decedent executed his will on March 29, 1929, some seventeen months subsequent to the date which said questioned instrument bears. He died October 16, 1931, and his will was admitted to probate on December 14, 1932. He made no provision for nor mention of plaintiff in said will.

Decedent's wife predeceased him by three years and a few months. The son, daughter and J. Wiseman Macdonald, executors, deny at length and in detail the genuineness of said instrument bearing date October 10, 1927, and allege by way of separate and affirmative defense matters which are absolutely opposed to and directly tend to refute the bona fides of plaintiff's claim. It is admitted by plaintiff that she wrote all the written matter constituting the questioned instrument except the name "J. B. Lankershim." It is also admitted that the ink lines drawn through certain printed words and figures and such interlineations and changes as appear upon the face of said instrument were made by her. Appellants insist that the instrument itself presents physical features which unmistakably bear witness that a number of changes and alterations were made after the name "J. B. Lankershim" was appended to it, and that the several physical changes which stand unexplained invalidate the instrument. Section 1982, Code Civ.Proc.

It is argued that the face of the instrument is self-accusatory and the doubts and uncertainties which it creates, and the incongruous situation which has been produced by the alleged transaction, are not consonant with the gravity or enormity of the transaction, nor agreeable with any sensible business method which a person of Colonel Lankershim's business experience and training would adopt for the accomplishment of a much less important transaction. In other words, it is contended by the executors that under no rule of rational conduct can it be concluded that a man who possessed the business sagacity which respondent attributes to Colonel Lankershim would have adopted a plan or scheme of transfer involving a large fortune which held within its basic construction elements which would obviously and inevitably furnish potential grounds of attack, such as are here made upon it.

The executors stress the fact that the signature "J. B. Lankershim" is divided into three parts, none of which are in alignment, and contend that it was written by a hand tremulous with age and inadequately directed by seriously impaired vision; that at a time when waning faculties had rendered him unable to resist the wiles and importunities of designing persons, a state of superannuation in which respondent herself had placed him, she obtained his signature by deceit and misrepresentations as to the true nature of the instrument, if, indeed, anything at all was written on the paper at the time his name was subscribed to it. That he relied upon others to read to him is firmly established by witnesses on both sides of the case. Plaintiff herself in her creditor's claim incorporates "reading to him" as constituting one of the assignments of employment upon which she predicates her claim for compensation.

Appellants' answers are pleaded in both categorical and conditional forms. They direct attention to the fact that all of the printed portions of the instrument were in the form of a check or draft, and the portions that were marked out of the instrument by plaintiff were marked out without the knowledge, consent, approval or ratification of decedent, and none of the printed portions left remaining were read to him, and contend that said printed words were left therein without the decedent's knowledge, and without instruction from him to leave said printed matter in said instrument, and it is, therefore, no part of said instrument.

The genuineness of the signature is denied on information and belief, but it is alternately alleged that if the signature is genuine, all of the written matter contained in said instrument was written after the signature of the decedent had been affixed to a check or draft and signed by him in blank as a matter of business convenience, made accessible to respondent by reason of the existing close personal and confidential relations which respondent fully describes in her verified claim filed herein. The other alternative suggested is that his signature was procured by misrepresentations as to the character of the instrument made to him when his signature was obtained.

The claim that the body of the instrument was either written in toto after signature, or was originally in form a draft or check in the sum of $500 and was thereafter altered and added to, is based chiefly on the close crowding of the words on the line on which the signature is written, and particularly on the fact that the word "me," next preceding the signature, is forced upward and out of line to prevent it from overlapping the signature. Other physical characteristics are pointed out as being wholly contradictory of and inconsistent with the claim that the matter which respondent wrote on the blank check truly recorded his dictation or expressed his wish.

By separate answer it is alleged that if said decedent executed and delivered said instrument, no consideration or benefit of any kind whatsoever passed to said decedent for its execution and delivery; that if any consideration passed from plaintiff to decedent on account of the making and delivery of said instrument, such consideration was grossly inadequate and it did not amount to more than a trifle in a transaction involving a half million dollars; that the procurement of that vast sum for such grossly inadequate consideration constituted a fraud practiced upon him.

It is affirmatively alleged by the answering executors that plaintiff became acquainted with the decedent about the month of January, 1924; that he was then past the age of seventy-three years and plaintiff was of the age of about thirty-five years; that she was then a married woman, the wife of Edres Herbert, and was then presumably residing with her husband in the city of Long Beach, county of Los Angeles, and said plaintiff herein and said Edres Herbert were at all times husband and wife; that on January 4, 1924, and for many years prior thereto, decedent resided alone at the Hotel Biltmore, in the city of Los Angeles; that during the period covered by the transaction herein set forth, plaintiff and decedent were on very friendly terms.

Said executors further allege that during all of the period from January 4, 1924, to October 10, 1927, decedent was in a weakened and debilitated condition and was being massaged and was receiving physical treatment from a professional masseur who was in daily attendance upon him at the Biltmore Hotel; that on October 10, 1927, decedent was past seventy-seven years of age, and he then was and for several years immediately prior thereto had been suffering from debilitating illnesses which had progressively increased with advancing years, thereby impairing his mental force and vigor to the degree that he was easily influenced by those who had gained his confidence; that decedent's eyesight had failed to the extent that on October 10, 1927, if able to read at all, it was only with the aid of powerful lenses, and that at all times herein plaintiff was familiar with decedent's physical and mental infirmities. A condition of atrophied impairment of the optic nerve of decedent's eyes will later receive attention.

It is further alleged that plaintiff, having formed the intent and purpose of obtaining from decedent a large sum of money, and being a woman thirty-eight years of age, and possessing an attractive personality and ingratiating manners, wove herself into his kindly favor; that she visited him socially on frequent occasions at his rooms at the Hotel Biltmore, and at decedent's expense she accompanied him to theaters and took many meals with him; that she performed petty acts of service, many of which were unnecessary, and all of them were done for the purpose of winning his trust and confidence and to assist her in gaining a dominating influence over him to the end that she might carry out her purpose of obtaining from him a large sum of money; that by the indulgence of blandishments and by doing the foregoing acts she succeeded in making him believe that she was fond of him, and was anxious to help him, and that he needed her assistance, all of which was untrue, and she thereby gained his trust and confidence; that plaintiff was a woman possessing considerable mental force, and decedent, having entered a state of progressive mental and physical disintegration, became dependent upon others in domestic and business matters, and plaintiff, taking advantage of his increasing weakness, exercised her power over him to the degree that she was able to dominate him to a marked degree and substitute her will for his will.

In furtherance of her said plan, on or about the middle of August, 1927, she left her Long Beach home and rented living quarters in the Engstrum Apartments in the city of Los Angeles, situated near the Hotel Biltmore, where decedent resided. It is further alleged that by her persuasion he gave up his apartments at the Biltmore Hotel, where he had made his home for a number of years, and on September 1, 1927, moved to an apartment at the Engstrum, selected by plaintiff, on the same floor and directly across the hall from the apartment occupied by plaintiff; that plaintiff visited decedent's apartment several times each day; that on the day the said instrument is alleged to have been executed she falsely and designedly, with the purpose of unduly influencing him, represented to decedent that she was his only real friend, and that she had done more for him than his children had done, and he ought to make her comfortable because of all her acts of kindness, all of which representations were false, but believed by decedent to be true; that while he was at said Engstrum Apartments plaintiff influenced him to deny himself to his friends, other than such visitors as she elected that he might see.

The answer alleges that before signing, or at the time of signing said instrument, if in fact and truth he actually signed it, in its present form or otherwise, the decedent consulted no attorney or friend, and did not advise with anyone as to its terms or effect, and that it was not the voluntary act of decedent, nor did it express his wish or will, but said instrument is the product of false representations and of undue influence which she brought to bear upon his will.

Defendants further allege that if decedent did in fact place his signature on said instrument, he was induced so to do by the representations of plaintiff that said instrument was a check or promise to pay to plaintiff $500 and no more, and that the fifth cipher was thereafter added by respondent in an attempt to convert the figures $500 into $500,000.

In physical appearance, the fifth cipher indisputably differs quite pronouncedly from the other ciphers in size, pen pressure, formation, and color intensity. Evidently a blotter was applied immediately after it was made. The spacing between it and the cipher next to it is much greater than the spacing between any of the other ciphers. It is raised above the ruled line, and corresponds in alignment with the two ciphers which constitute the figures "500," after which there is a period and two other ciphers, which, defendants claim, was the true and original amount before it was changed by plaintiff from $500.*00* to $500,000. The lower loops of the last two ciphers, denoting cents, drop below the ruled line, thereby differentiating them in alignment from the ciphers admittedly standing for dollars, while the alleged added cipher and the two ciphers expressing the amount in dollars, two spaces removed to the left, are in alignment; that is, all three are equidistant above the line. In other words, the two ciphers underscored, representing "00" cents (provided the amount is to be read $500.*00*), drop below the ruled line, whereas the two ciphers immediately to the left of said ciphers are in alignment with the figure "5" as in $500. The physical fact cannot be disputed that if a blinder is placed over the disputed cipher, which appears some distance to the right of the fourth cipher, the amount is $500. The point after the second cipher is undoubtedly a period.

The contentions of the executors, briefly stated, as to the instrument itself are: (1) That the signature of the deceased was obtained by trick or device, or his signature was affixed to the instrument in blank and the plaintiff thereafter surreptitiously obtained the same and wrote all that appears thereon; (2) that the instrument as originally written provided for the payment of $500, and some time thereafter plaintiff fraudulently changed it to its present form; (3) that the large sum is accounted for on the theory that it was not possible, without creating telltale evidence of the erasure of the *period,* to raise it to any other or intermediate sum below $500,000; (4) that the words "thousand dollars," and the insertion "one month" after the fifth cipher, and the changing of the year 1927 to 1924, and the whole of the closing lines beginning with "kindness," constitute proof that the changes were made long after the signature of the decedent was written on the instrument.

It is a further allegation of the executors that whatever attention or courtesies were shown the colonel by her were done for the purpose of cajoling him by delusive flattery into the belief that his welfare was a matter of deep concern to her; and that she made no suggestion to him that she intended to make a charge against him or his estate for any of the services to which she now lays claim. Section 337, subdivisions 1 and 2 (as amended by St.1935, p. 1740), and section 339, subdivision 1, Code of Civil Procedure, are pleaded as bars to plaintiff's action. The foregoing sets forth in substance the issues as framed by the pleadings.

The jury returned a verdict in favor of plaintiff for the sum of $500,000, the full amount demanded, with interest at the rate of 7 per cent. per annum from November 16, 1931. Judgment was ordered entered in plaintiff's favor in accordance with the jury's verdict including the costs of trial. The amount of the judgment, including interest, now approximates $700,000. The defendants have appealed to this court from an order denying their motion for judgment notwithstanding the verdict of the jury, and from the judgment in favor of plaintiff and against the defendants. The appeal is presented on an engrossed bill of exceptions.

Many assignments of error are set forth by appellants as to certain instructions given on behalf of respondent, and the refusal to give a number of instructions requested by appellants on matters of law necessary for the guidance of the jury, also undue limitation of cross-examination of plaintiff's chief witnesses, and as to numerous errors made in admitting evidence over the appellants' objections, and excluding material evidence offered by appellants, greatly to their prejudice. Other rulings are complained of, but only such rulings as are of major importance will receive consideration.

The transaction in its inception, development, and final consummation, as told by the witnesses for the respondent, presents an extraordinary proceeding. It is earnestly insisted by appellants that no reasonable deduction can be made from the testimony of respondent's witnesses other than that respondent planned to acquire, with the cooperation of her associates, a large part of the decedent's estate, the plan to be executed in secrecy and known only to a coterie of her intimate friends and associates who were unquestionably active in assisting her cause. The age, physical incapacity and failing mental powers of the decedent, which are made apparent by the transaction itself (conceding that he performed the alleged acts in the manner claimed by respondent), and other circumstances shown at the trial, including the confidential relations which are clearly shown to have existed between said parties by the case made out by the respondent herself, and the inadequacy of any consideration that the decedent may have possibly received from respondent, make it the duty of a reviewing court to searchingly scrutinize the transaction.

[1] This rule has been announced in various forms by this and other courts. A concise statement of the rule where the relations between the parties were intimate and highly confidential, as here, and where the donor had no independent advice, and where the conveyance was without valuable consideration, or, it may be parenthetically added, in cases where the consideration is grossly inadequate, is announced as follows in Mead v. Mead, 41 Cal.App. 280, 285, 182 P. 761, 763: "Under such circumstances, the decisions hold uniformly that the transaction resulting in benefit to the trustee should be viewed with 'the most scrutinizing jealousy,' and that the presumption of fraud attaches and must be overcome by evidence that the deed is what it purports to be." (Citing a long list of authorities.)

Paraphrasing the language used in Cox v. Schnerr, 172 Cal. 371, 378, 156 P. 509, 512, it may be said that "plaintiff herself furnished proof of the utmost trust and confidence reposed in her by Colonel Lankershim." It is there further said:

"The burden of proof usually rests upon the person asserting fraud; but, when one bases a claim upon a contract obtained from a person to whom he stands in a relation of trust and confidence, it becomes his task to prove that he exhibited that uberrima fides which removes all doubt respecting the fairness of the contract. * * * It applies in every case 'where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding.' 2 Jones on Evidence, (Ed. of 1913,) § 190.

"In every transaction of this kind, one who holds such confidential relation will be presumed to have taken undue advantage of the trusting friend, unless it shall appear that such person had independent advice and acted not only of his own volition but with full comprehension of the results of his action. Ross v. Conway, 92 Cal. 632-635, 28 P. 785; Darlington's Estate, 147 Pa. 624-631, 23 A. 1046, 30 Am.St.Rep. 776; Firebaugh v. Burbank, 121 Cal. 186-191, 53 P. 560; Piercy v. Piercy, 18 Cal.App. 751-756, 124 P. 561; Odell v. Moss, 130 Cal. 352-357, 62 P. 555."

The rules of law as announced in the above-cited cases and in many others of this state furnish the criteria or tests which must be applied to the issues of fiduciary and confidential relations which have been indisputably shown to have existed between respondent and decedent, Colonel Lankershim. Whether undue influence will be presumed or inferred from the relationship as described by the evidence is a matter which necessarily involved the proposition as to whether the instructions given by the court sufficiently covered the issue of undue influence, or were as full, direct, and explicit on that issue as the appellants were entitled to have given in the circumstances of the case. We will later consider that question in our discussion of the sufficiency of the instructions.

We will next give consideration to the testimony of the four experts who were called to testify in the case. Two were called as experts in handwriting and photographic art in its highest form of development, as a means of distinguishing the genuine from the counterfeit, and two were experts in the restoration of deleted and changed texts, one of whom made chemical analyses and other tests as to the kind and color of inks used in the production of the questioned document. All of them apparently brought to their aid all that science and chemical knowledge of the subject afforded. Albert S. Osborn, lecturer at the United States Bureau of Investigation at Washington, D. C., and a nationally recognized authority on handwriting and disputed documents, and James Clark Sellers, a lecturer at the University of Southern California, and an expert examiner and photographer of questioned documents, also a widely known authority in his special lines which embrace the subjects of inks, dyes, ink absorptions, and the determination of whether writings which cross creases made by the folding of papers were done after the instruments had been folded (as was contended by all the experts in the instant case) or were done before the creases were made by folding, and also offered as an expert as to alterations made in documents since originally written, were the two witnesses called by the appellants. Dr. Lodewyk Hendrikson, head of the photechnical department at the Huntington Library and Art Gallery at San Marino, whose special work is the reproduction and the examination of documents, and the restoration of texts which have been deleted, changed, or altered, and Professor Brinton, head of the department of analytical chemistry at the University of Southern California, and who formerly occupied chairs as teacher and lecturer at the University of Paris, the University of London, and the University of Minnesota, were specially selected by the court (Code Civ.Proc., § 1871), and gave testimony as to the integrity of the questioned document. All four were definitely of the opinion that the signature, J. B. Lankershim, was not written at the same time, with the same kind of ink, or under the same writing conditions or circumstances as other parts of the instrument were written. The experts in handwriting were of the opinion that the last cipher in "$500,000," and other specified parts of the instrument, were not written at the same time that the body of the document was written, and that the ink coloring was different in stated particulars.

The highlights of the opinion evidence given by the experts called by the appellants and selected by the court (none were called by respondent) may be briefly summarized as follows: The signature, J. B. Lankershim, was written before the body of the instrument was written; the shade of color of the ink is different in certain designated words from the shade of others; discs, or small particles of cakes caused by the drying of ink upon the pen are discernible in the lines of the first letter, initial "J," in the signature, which do not appear elsewhere in the writing of respondent; the shade of color in the signature is different from the other writing; the instrument had been folded before the body of the document was written, as shown by the spreading of ink as it crosses the creases made by folding; in some instances the ink, where the writing crosses the fold, penetrates to the back of the instrument; a splash of ink is discernible on the right side of the letter "H" where it crosses the fold line as the pen was caught in broken fibre made by the fold; the date line at the bottom, "Jan. 4, 1924," was originally written 1927, and two figure fours were afterwards superimposed upon the numeral "7" in an effort to convert it into "4"; the word "me," next in position to the letter "J," was given an upward slant to avoid writing into the letter "J," which constitutes the first letter of the signature; "one month," the word "me," and the fifth cipher of "$500,000" were blotted, and no blotter was used on any writing nearby or elsewhere; if all parts of the instrument had been written at the same time, other words in close proximity to the blotted words and cipher would also show ink absorptions; the letters forming "Five hundred" are either generally vertical in position or slant to the left of a vertical line, whereas the words "thousand dollars" immediately following said words, and which are claimed by the experts on penmanship to have been written at a subsequent time, slant to the right; the words comprising the sentence "kindness and protection to me," which are written below the printed words "value received and charge to account of," are closely crowded together.

Other questions as to word and letter spacing, pen pressure, slanting of letters, arrested and cramped arm motion, differences as to the lightness and heaviness of ink fluids, and ink blurs, which may be readily observed by an inspection of the instrument, are discussed at great length. It is appellants' contention, supported by expert testimony, that if decedent knowingly signed his name to the draft or check, it was written as a straight check for $500, and all that appears upon its face tending to transform it into a $500,000 obligation was written without the consent or knowledge of the decedent. The photographic copy of said instrument is herein reproduced. It shows generally the physical things which form the basis of the experts' opinions, except as to a faint crease made by folding the paper a second time at a point midway between the crease running through the center from top to bottom and the left edge of the document.

[2] Appellants stress the point that the testimony of the experts is uncontradicted

in the main, and in this particular their contention in some respects is borne out by physical facts appearing upon the face of the instrument which are brought directly to the attention of this court for scrutiny. Such evidence cannot be arbitrarily ignored or nullified by the jury's verdict based upon the testimony of a single witness as to the execution of said instrument, if the testimony of said witness contains within itself such evidentiary weaknesses and abnormalities as to render it too unreasonable and inherently improbable to support the judgment, particularly in the light of the facts of this case, which, under all authority, must be jealously scrutinized.

Plaintiff's case rests in no small degree upon alleged oral admissions made by decedent against interest. The only evidence which can be regarded as corroborative of Miss McKee's testimony as to the execution of the disputed document is the instrument itself, admittedly in the *handwriting* of the plaintiff to which the decedent's name is attached. Appellants insist that her testimony as to the production of the instrument is impeached by the inherent improbabilities which confront it and by the instrument itself in the circumstances of the case. On the subject of oral admissions, unless corroborated by *satisfactory* evidence, this court, in the Estate of Emerson, 175 Cal. 724, 728, 729, 167 P. 149, rates it as the weakest of testimony that can be produced. Lord Romilly, master of the rolls, in Crouch v. Hooper, 16 Beav. 182, made the following observations as to this kind of testimony: " 'It is always necessary to remember that in these cases, from the nature of the evidence given, it is not subject to any wordly sanction, it being obviously impossible that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person.' Therefore, proceeds the learned judge, he has never experienced any difficulty in rejecting and disregarding such evidence." The decision points out that the position or interest of such witnesses may be so patent as to make it " 'the duty of the court to examine their testimony with a jealous care and to scan it with a watchful scrutiny. They are masters of the situation and swear without fear of contradiction. The safe administration of justice demands that in such a case there should be either *satisfactory* corroborative evidence, or that the evidence of the living party should be so full and *convincing* as to persuade the court of its entire truth.' And, finally, the text-writers show that the courts are all in accord in thus weighing such evidence, and here suffice it to cite 2 Moore on Facts, §§ 877, 1150 and 1166; 1 Taylor on Evidence, § 648; Wigmore on Evidence, §§ 578, 2065." (Italics ours.) Estate of Emerson, supra. In support of the above text, section 2061, subdivision 4, Code of Civil Procedure; Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am.St.Rep. 87; Austin v. Wilcoxson, 149 Cal. 24, 84 P. 417, are also cited. It is also urged that plaintiff's case is founded on coincidence, fortuitous circumstance and unusual incidents or events which have neither a natural or logical beginning nor sequence, and are at variance with the rational conduct of a person who had in contemplation a transaction of the kind, importance and magnitude of the one under examination.

It is pointed out that it is the duty of courts, in the examination of cases of the nature of the one before us, not only to inquire into the confidential relations existing between the parties involved, but also to carefully scrutinize the purposes and intent which likely motivated the party who would become excessively enriched by the accomplishment of a grossly uneven bargain. It is insisted with much force that in view of the relations which existed between the principals to the controversy and the nature and magnitude of the transaction, in the light of the evidence disclosed by the record, due respect to and regard of the laws which direct human conduct, particularly as applied to persons highly trained in business affairs, render the case made by respondent too weak and insubstantial to support a judgment grossly in excess of the value of any services respondent had the ability to perform or of which the decedent was in need.

The evidence upon which respondent relies to sustain her judgment, and which appellants most vigorously assail, was given by Miss Stella McKee, a close friend and companion of respondent for a number of years. Like Mrs. Herbert, she resided at Long Beach, where their relations had been very intimate for several years. She accompanied Mrs. Herbert to the lawyer's office during pre-trial days and at the trial of the case, and, no doubt, counseled with her. Mrs. Herbert had lived in her apartments at Long Beach, and she was acquainted with Mrs. Herbert's husband. The witness of equal importance to Miss McKee, and who was most active in promoting a relation of companionship and personal friendship between Mrs. Irene Herbert and Colonel Lankershim, was Mrs. Adele Blood Hope. After leaving Long Beach, Mrs. Herbert occupied, at various times, apartments rented by Mrs. Hope. Mrs. Hope originally introduced and brought together Mrs. Herbert and Colonel Lankershim. Her activity in Mrs. Herbert's interest appears from her own admissions. She afterwards met her on several occasions and under various circumstances at the Biltmore Hotel in the apartment of Colonel Lankershim.

Miss McKee, at the time of trial, testified that she was then employed as a cashier in the public utilities department at Long Beach, had formerly been employed by a Long Beach bank as teller or cashier, but was without employment after July, 1927; that she was a visitor on five or six occasions at the apartments of the colonel upon invitation of her friend, Mrs. Herbert. She partook of meals and attended a picture show or theater frequently as the guest of the colonel, and partook of his hospitality very freely. Because of his failing eyesight, theater seats were never further from the stage than the second or third row. He said he "had to sit close to the stage." Frequently he would leave the theater before the picture or program was more than half completed. The numerous dinners which the witness and other mutual acquaintances and friends of Mrs. Herbert enjoyed at the Biltmore Hotel were served in the colonel's apartments. He paid all bills. He seemed generous in hiring taxicabs and placing his automobile at the disposal of his female guests, both for use within the city and for beach and long distance trips. Miss McKee, who testified that she was in the colonel's room at the time the disputed instrument is claimed to have been written, said, in explaining her presence, that a few days before October 7, 1927, she received a letter at Long Beach from Mrs. Herbert, who reminded her that her (Miss McKee's) birthday fell on October 7, and invited her to attend a birthday party which she wished to give in celebration of the occasion at her apartments at the Engstrum Apartments, where she was stopping. The witness answered, accepting the invitation.

In her deposition, taken some five months before she testified in the case, she stated that she did not attend on the day set, as her duties at the bank would not admit of her attendance. Her attention being called to the fact that she had not been employed at the bank since the month of July preceding, she admitted error, but was unable to recall the circumstances which prevented her attendance on the seventh. She did arrive from Long Beach on the evening of the ninth of October. She took dinner in Mrs. Herbert's room, Colonel Lankershim being present, and remained overnight with Mrs. Herbert. Upon arising in the morning Mrs. Herbert prepared breakfast for the three. Between 9:30 and 10 o'clock she and Mrs. Herbert entered Colonel Lankershim's apartments, which were across the hall from Mrs. Herbert's room. Mrs. Herbert carried a tray containing muffins, some fruit, coffee, tea, sugar, and cream. Evidently their entry into the colonel's apartment was an unexpected visit. The colonel was lying on his bed and was attired in his dressing robe and had on slippers. He took his breakfast reclining on the bed while Miss McKee and Mrs. Herbert ate from a small table which they had set.

After breakfast the colonel complained that the masseur employed to attend him had not arrived. He was disappointed and annoyed that the masseur was not there to perform a duty he was hired to perform. He said that Irene had never failed him. Mrs. Herbert then suggested that she do something for him and she began to rub his arms, the back of his head and neck, and to put cold compresses over his eyes. In her deposition Miss McKee had averred that the colonel complained of feeling tired and said his eyes were bothering him. She contradicted this statement at the trial and testified that he said nothing about his eyes bothering him or feeling tired, but when they entered he said he was feeling fine.

According to the witness he was lavishly profuse in his praise of Mrs. Herbert. He complimented her for the perfect manner in which she had cooked the prunes, and the muffins and the coffee were just to his liking. He said, "Irene, you know how to cook meals to suit me." He further said she was always thinking of the things he liked and preparing them as he liked them; that she did more for him than anybody in the world, even his own children; all the little things she did meant very much to him; that he was never disappointed in Irene; she had an understanding mind and knew what he liked and when he wanted a thing done she did it. He spoke of her kindness and thoughtfulness of him, and how necessary she was to him. When she had finished rubbing his arms and head, he said: "Now I am going to make good the promise I made you. I am going to pay you well for your services." He arose from his bed and went to a dresser, took out a piece of paper, and said: "I want you to write what I am going to dictate."

The witness then recalled that he dictated "something like this." She then repeated verbatim, even as to the order and arrangement of each word and sentence, the verbiage appearing in the body of the written instrument which she had heard dictated but once and had not seen or heard discussed by anyone during a period of nearly six years. She and Mrs. Herbert had lived within that period in the same apartments for some time and at one time were interested in a common business enterprise. They had resided within a half block of each other at Long Beach for quite a period and had been close friends and companions for a number of years, but at no time did she or Mrs. Herbert even hint at or mention the existence of the instrument, notwithstanding the fact that Mrs. Herbert, according to her testimony, usually carried it in her passport book or purse on her person, and at no time was it out of her immediate control prior to the colonel's death.

The witness testified that it was an unusual instrument in form, such as she had never seen before in her experience as a bank employee, and she was unable to classify it. She testified that the colonel requested of her and Mrs. Herbert that they should not mention the transaction to any one. This commitment of secrecy was not observed by the colonel himself, if the testimony of Miss Ruth Belle Allen, daughter of Mrs. Isabel Clark and an intimate friend of Mrs. Herbert, is to be accepted, as she testified that she met the colonel in Mrs. Herbert's apartment on the afternoon of October 10, 1927, and he was smiling and said to the witness, Mrs. or Miss Ruth Belle Allen: "I told you I was going to pay Mrs. Herbert. I have given her a note for half a million dollars, payable a month after my death." She had known the colonel not longer than seven weeks. He further cautioned: "I don't want you to mention this to anyone, Miss Allen." He called her Ruth. She said she would not mention the note. He said: "I wouldn't tell you, but I can depend on you not to tell this where people will discuss it." He did not say why he did not want her to tell. Mrs. Herbert did not say anything, but "just smiled." The witness claimed that she did tell her mother and discussed the matter with Mrs. Herbert.

Returning to the story of the production of said instrument as related by Miss McKee, appellants seriously contend with good reasons that the reproduction, word perfect, of an instrument which is peculiar in its phraseology, and which the witness heard read but once and which she read herself but once, and which had not been seen or discussed by her or by any one else in her hearing, after the lapse of a period of more than five years is such a wide departure from the usual and common experience as to the operations of the mental faculties as to partake of the miraculous in mnemonic feats and has a strong tendency to bring distrust upon the testimony of the person claiming the power to perform such a feat, tested by the rule of reasonable probabilities, taking due note of all the other facts and circumstances which bear upon the testimony under scrutiny.

The witness, further describing the transaction, said that the colonel was lying on the bed while he was dictating, and respondent was sitting in a rocking chair, holding the paper on her lap as she wrote the dictation. The witness from her position said she could not see what Mrs. Herbert was writing. When the dictation was finished Mrs. Herbert read it over and said: "I forgot to put in the 'one month.'" He said: "Insert it after the $500,000." She read it to him, and handed the note to him. He looked at it and got up out of bed and went over to the dresser and signed the note. He was in bed when she handed it to him after she had written it. The witness said he appeared to have read it. When he reached the dresser he pushed the cover back and began to use his arm as if writing. He had a pen in his hand which he got from Irene Herbert. The witness said she could not say it was a different pen or the same one used by Mrs. Herbert. She did not notice what was done with the pen. He handed the note to Irene. She took it, looked at it and said: "Colonel Lankershim, I thank you." The colonel went back to bed. Mrs. Herbert passed the note to her, she took it in her hand, read it, and returned it to Mrs. Herbert. She said she recognized the instrument dated October 10, 1927, as the same paper handed to her by Mrs. Herbert five years previously.

She further testified that the colonel told Mrs. Herbert "to take it [the paper] to the bank and keep it there until after his death, and then to take it up to his attorney, Mr. Macdonald, and he would see that she received the money." The witness did not know what Mrs. Herbert did with the note after the colonel gave the above instructions. It is certain that she did not follow his instructions in a very important particular. After Mrs. Herbert handed the note to the witness she left the apartment alone.

She first met the colonel in 1924, when she visited his apartment at the Biltmore Hotel upon the invitation of Mrs. Herbert. The witness recited the months from memory on which she had met the colonel since 1924. Most all of the five or six meetings were had upon invitation of Mrs. Herbert at the Biltmore Hotel. She took meals with Mrs. Herbert in the colonel's apartments and attended places of amusement as his guest. Upon the occasions when she was at his rooms Mrs. Herbert took to his rooms custard, vegetable soup, or lamb stew. On one occasion she prepared his bed for him; once she mended his hose and sewed buttons on his clothing and rubbed spots off his clothes after eating dinner; once she heard her call a valet and instruct him to take his clothes to the cleaner. She had also seen her rub his hands, the back of his neck and head, and heard him say, "she had a very soothing touch to her fingers." The witness stated in her deposition that the colonel said he was going to pay respondent well for her services. She quoted the colonel as saying: "I am going to fulfill my promise and pay you for services rendered." Nothing was said by either as to what would constitute a reasonable charge.

During the early stages of Miss McKee's testimony she described with meticulous detail the dictation as given by the colonel. She made conflicting statements both as to the year and month that the services were to be reckoned from, but finally said she remembered that the true date named as the commencement of service was January, 1924. The body of the instrument as written was reproduced word perfect, even to the order of its language. She said that in writing the instrument Mrs. Herbert omitted from the dictation the words "one month" next after $500,000, and her memory was that she discovered the omission while in the midst of writing the instrument. At other times she stated that Mrs. Herbert discovered the omission after she had finished writing the instrument. The time of discovery was left by the witness in a state of confusion.

She gave conflicting testimony as to whether Mrs. Herbert selected the place where the omission should be inserted without instructions from the colonel, or whether the place of insertion was made as dictated by him. In a part of her testimony she said that the colonel with much exactness instructed Mrs. Herbert to insert the omitted words immediately after "$500,000" as expressed in figures, and in other parts she said that he gave her no instructions as to the place where the insertion should be made, and that Mrs. Herbert inserted the omitted words without any instructions from anyone, as "she knew where to put it."

Miss McKee also testified as to paper, pen, and ink being in the room, but did not see a blotter in the hands of Mrs. Herbert, on the table or elsewhere in the room. A caret indicates the place where the omitted words were inserted, which clearly shows that they were supplied after the instrument had been written, or at least after the line in which they were inserted was completed. The witness also testified that Mrs. Herbert was seated in a rocking chair and wrote from her lap. A table and stationary chair were accessible and were used by the colonel when he is said to have written his name. In relating the circumstances in which the said instrument was written, she testified that the colonel arose from his bed, went to the dresser, took out a piece of paper, and carried it, together with pen and ink, to a table and instructed Mrs. Herbert to write what he was about to dictate. Why Mrs. Herbert should have selected a rocking chair, and written from her lap a document which she must have known was of tremendous importance to her, was not explained. It is not claimed the colonel sat in a rocking chair when he signed his name at the dresser. The note was read to the colonel as he was lying upon the bed, and handed to him. He took it in his hand and appeared to read it. He arose from the bed and took the paper and pen to the dresser and appeared to be writing. He returned, handed her the note, and went back to his bed. Mrs. Herbert said nothing to the witness that she could recall with respect to the instrument after it was signed and delivered to her. She left the apartment a few minutes later. During all of their close relations and friendship the matter was never again referred to until Miss Mc-

Kee's deposition was taken almost six years later.

Whether or not the instrument had been folded before Mrs. Herbert had written the alleged dictation became a matter of inquiry. The witness testified that she held the instrument in her hand and read it. She was then asked:

"Q. Had it been folded at that time? A. It had not.

"Q. Perfectly flat? A. It was."

The witness then returned it to Mrs. Herbert and said she didn't know what respondent did with it. Under examination by appellants, she said that she saw "some printed matter" on it but she did not "pay any *attention* to the printed matter." The following question was then put to her:

"Q. You did not read the printed matter on it then, did you? A. 'For value received,' I remember seeing that.

"Q. The Colonel did not dictate 'for value received', did he? A. It was printed on it. The Colonel did not dictate 'for value received'. I don't recall that Mrs. Herbert read 'for value received' when she read the contents of the note.

"Q. Don't you know that she did not? A. I don't recall her reading it."

The instrument shows a crease through the center. The experts point out that the spreading of ink is discernible in the trough made by folding in several places. The writing in crossing the trough loosened the fibre or sizing of the paper and left it much in the condition of blotting paper. It is pointed out that the capital letter "H" near the top of the paper, being the first letter of respondent's surname, and the letter "m" in "me," appearing near the signature "J. B. Lankershim," prove that Mrs. Herbert's writing was done across a distinct crease made by folding the instrument. It is also claimed that the ink penetrated through the paper in places and is discernible in the photograph taken of the back of the instrument. Several printed words not mentioned by Miss McKee and which were not stricken out by Mrs. Herbert appear upon the face of the instrument. "Los Angeles, Cal.," the first words of the instrument, and the word "dollars," well down in the instrument, and the last five words of the "value received" clause, to wit, "and charge to account of," are printed words not referred to by the witness. The words "value received,' which she had a distinct recollection of observing, were of great importance to the respondent's case. The witness testified that she had not been aided by anything she had heard or seen since October 10, 1927, and her testimony was based solely on her memory as of that date. The witness had no such accuracy of memory as to any other matter printed on said note. She was unable to recall anything that Mrs. Herbert wrote to her when she invited her to the birthday dinner, or anything she said in her reply or in explanation as to why she was three days delayed. The other unusual trait of memory exhibited was her ability to name the several months in which she had heard the colonel speak in complimentary terms of Mrs. Herbert. In a number of other matters her memory was faulty.

The witness next in importance to Miss McKee was Mrs. Adele Blood Hope, also known as Miss Blood, who identified herself as "formerly known as Adele Blood, the actress," and as having played many engagements in Los Angeles and particularly the character of "Everywoman" in the play known as "Everywoman." She was forty-seven years of age, a native and resident of California, but had been residing in New York City for some three years past and came specially to Los Angeles to testify in the case. She was engaged in the advertising business in New York. She said that she first met Colonel Lankershim in 1908 at the Lankershim Hotel, in Los Angeles. She was intimately friendly with him and the acquaintanceship continued until 1928 or 1929, which was the last time she saw him. She had known Mrs. Herbert eighteen or nineteen years. She first met her at her home at Great Neck, Long Island. She introduced the colonel to Mrs. Herbert either before Christmas day in 1923 or soon after New Year's day, 1924, at the Biltmore Hotel, Los Angeles. She left soon afterwards but returned about Christmas time in 1924. During a time when Mrs. Herbert and the colonel were visiting at her home in Hollywood, Miss Blood said that the colonel asked her if she knew that he had made Mrs. Herbert his companion. She replied that she had not known this, and the colonel said the very fine cooking that she had done in her apartment had made him realize that he had been living in hotels and not getting the right kind of food. He had been interested in getting his health in better condition. The witness said she then asked Mrs. Herbert how it seemed to be drawing a salary.

She said she was not drawing a salary. Miss Blood then said: "Well, if I were a companion to anyone I would certainly want to draw a salary for my work." The colonel said "likely that I would, meaning me, but that he would pay Mrs. Herbert in his own time and in his own way. I told him I thought it was rather an unbusinesslike procedure." There is no evidence that Mrs. Herbert was a cook or ever was so engaged or that she was ever engaged as a nurse. Miss Blood, her close intimate friend, never knew her to be so engaged. The evidence points in an opposite direction. The colonel at all times stayed at hotels well supplied with bellboys, housemaids, valets, chefs and such other attaches as first-class hotels afford, and with the best there was of culinary art for the comfort and convenience of their guests. The fact that the colonel preferred first class hostelries to the private home cooking of which it is said he was so fond is proved by the fact that, except for the few weeks he was at the Engstrum, where all relations with Mrs. Herbert ended, he made his home at the Biltmore Hotel, where every modern convenience of living and service was at his beck and call. There is no evidence to justify an assumption that Mrs. Herbert at any time rendered regularly continuous or necessary service in the capacity of a cook, nurse or attendant, with the understanding or in the sense that persons are employed to perform such services. It affirmatively appears by the testimony of plaintiff's chief witness, Miss McKee, that he stated that he had a regularly employed masseur at the time the instrument in question was executed, and from statements of other of her witnesses it is clear that said masseur or attendant had been in his continuous service for a number of years, and it was his duty and habit to visit him every morning and administer to his physical needs and personal welfare. There can be no doubt but that he was surrounded by a coterie of attendants employed by the leading hotel where he lived in comfort and luxury.

The witness stated that in 1924 she rented a flat for occupancy by her mother at West Eighth and Garland streets. Mrs. Herbert stayed at the apartments much of the time when Miss Blood was away, and also when she was there. Mrs. Herbert and Miss Blood's mother lived in the same flat both at Eighth street, Los Angeles, and at Long Beach. Mrs. Herbert occupied the witness' room many times when the witness was not in Los Angeles. The colonel was then living at the Biltmore Hotel. Miss Blood was at the Biltmore Hotel from October, 1925, to the spring of 1926. She testified that Mrs. Herbert was always at the Biltmore apartments when she called on the colonel during her stay from October, 1925, to the spring of 1926. She saw Mrs. Herbert brush his hair and bring him a wet towel so he could wash his face. She would order his breakfast, and nearly always supplement it with something she brought with her. She saw her bring him his glasses and wipe them, and give him medicine, massage his neck and head. She sometimes put a light on his face for nervous trouble he had on the side of his face. She had seen her dry clean his ties, mend his underwear and socks; help him put on his slippers and dressing gown; clean spots from the front of his clothing; order his meals; arrange for theater tickets and accompany him to the theaters and see that he was comfortable; assist him in the taxi and see that the windows were closed, which often made it uncomfortably close in going to theaters; saw her manicure his nails.

She said she and the colonel often walked from the Biltmore to Mrs. Herbert's apartments at the Engstrum and had dinner at Mrs. Herbert's apartments. She met him in Paris in 1926 and had lunch with him several times, and he expressed a regret that he had not taken Mrs. Herbert to Paris with him. (This was while he was on one of the regular annual trips he made to Paris to visit his wife, who was in ill health, and his daughter. He annually spent from four to seven months in Paris with them.) She testified that he expressed regret that he had not taken Mrs. Herbert with him to Europe as he was extremely lonely and had no one to go with him to the different restaurants and theaters. She noticed an unclean condition of his vest and tie and called his attention to his untidiness and he said: "If Irene was here this would not have happened. I have been so dependent on her care. Sometimes I am careless.'" She took him to her sitting room and removed the spots. She met him in New York in 1927. Mrs. Herbert came with him and she met them upon their arrival. He was then on his way to Paris to visit his wife and daughter. Mrs. Herbert stopped at New York, where Miss Blood was then living. Miss Blood next saw the colonel in August or the first of September at the Engstrum where Mrs.

Herbert was living. The witness left shortly for New York and did not see him again until her return to Los Angeles in the latter part of February or first week in March, 1928. She met him in the galleria of the Biltmore and had luncheon with him. He told her that Mrs. Herbert was no longer with him. The witness expressed surprise and the colonel asked her if she had not known it and she replied in the negative and asked him why it was. He told her that his attorneys had felt that "it was best that he have a man companion or attendant." The witness said it was too bad, as she had been with him during all these years. "I asked him what he had done, how much he paid her, Mrs. Herbert, for all the years of service, whether he had paid her and he said he had. I asked him how much he had paid her, how much he had given her. He said he had not given her money. I said, 'Well, that is rather amazing. What did you do?' He said, 'I have given her a note for services rendered,' when he could easily give her money. He said he liked to do things in his own way. He always was not in a position from the curiosity of people surrounding him to do things as he wanted to do even though he was a man of wealth." The witness asked the amount of the note and he said it was enough to take care of her for the rest of her life and that she would have "plenty for some of her pet charities." In reply to a further question as to when the note was due, he answered that it was due "one month" after his death. The witness then said: "I told him I thought it was very silly thing, it would be very much better if he gave her money while he was alive instead of giving a note payable after his death. He told me that one of the real regrets of his life would be that he would not be here to see Mr. Macdonald's face when he saw the note." This was rather a grim quip of humor for a man who, as the witness said, was not then well and who certainly was infirm with age. The above colloquy illustrates very forcibly that she appeared to be more concerned as to the amount of money that her friend, Mrs. Herbert, was to receive from the colonel than she was in his comfort or his personal welfare. It also gives weight to the claim that someone exerted influence over him which outweighed any counter advice that his attorney might give him on the subject, and that such assurance of providing for Mrs. Herbert would tend to quiet the fears of his interrogator. Mrs. Herbert's name was again interjected into the conversation by Miss Blood, who said the colonel spoke of missing her care and that he was lonely and the man caring for him was not very companionable and did not add to his comfort.

The colonel left the Engstrum Apartments some three weeks after the transaction of October 10, not later than the first of the following month, as related by Miss McKee, leaving Mrs. Herbert occupying a room on another floor, and returned to the Biltmore Hotel.

On cross-examination the witness testified that her first meeting with Mrs. Herbert was at Great Neck, Long Island, but she did not give the year. She never knew that she had any occupation. She said on three or four occasions, or possibly a half dozen, she had prepared meals for the colonel at his Biltmore apartments in 1924. The evidence by all other witnesses was to the effect that meals were served at his rooms by the hotel at his expense for his visitors, and that Mrs. Herbert brought with her on occasions soups or mutton stew or some delicacy which he specially fancied as supplementary to the meals ordered sent to his rooms. In addition to what has already been related, she said that in 1924 she had seen Mrs. Herbert help the colonel up the walk, in and out of taxis, and saw that he had selected food. Mrs. Herbert usually had him by the arm, as he seemed a little feeble. The witness said she had visited his apartment upon his invitation many times and had breakfast, and had been there occasionally until midnight. Mrs. Herbert was also there, and she said she never saw Dr. Fred Foster, his masseur, attending him. Sometimes Mrs. Herbert signed the charge checks for meals, and sometimes the colonel signed them. On a few occasions Mrs. Herbert stayed at the Biltmore as her guest and occupied a bed in her room.

Four members of the Clark family, mother, father, daughter, and son, were witnesses in the case. The mother and daughter and son were called by plaintiff, and the father was called by the defendants. All were personal friends of Mrs. Herbert. Mrs. Isabel H. Clark, mother of Miss Ruth Belle Allen and Frank D. Allen, and wife of Ivy C. Clark, was the first of the family called to the stand. She had known Mrs. Herbert seven or eight years. She first met the colonel when he was on his bed, sick, at the Biltmore. She was with her husband. Mrs. Herbert met them in the hotel lobby and all went to his room and she introduced them to the colonel. They stayed only a few minutes. Mrs. Clark and her husband went back after a short time, perhaps a month thereafter. He was then up. He had told Mrs. Clark on her first visit to come back and take lunch with him. Mr. and Mrs. Clark on their second visit stayed about two hours. Mrs. Blood and Mrs. Herbert were there. They took lunch in the colonel's suite. The witness said that the colonel spoke to her about Mrs. Herbert's kindness and faithfulness to him. She helped him to put on his shoes or slippers. She poured his tea. He was a great lover of tea. Before they left Mrs. Herbert had to take him to his bedroom. Three or four months after she first met him, Mrs. Sidney Chaplin invited her to lunch. Four sons and Mr. and Mrs. Clark were all guests. The witness said whenever she met him he always spoke of Mrs. Herbert's loyalty to him. She said they visited him on other occasions at the Biltmore, and took lunch in the dining room at the Engstrum. The colonel and Mrs. Herbert visited the Clark's home in 1926 or 1927 and had meals. Mrs. Herbert made the tea and cooked at their home the spinach and chicken. She prepared his plate and carried it to him. She took him to the bath and helped him; saw her massage his neck, head, arms, hands, feet and knees. She saw Mrs. Herbert do cooking many times at the witness' home or at the Engstrum Apartments at times when they did not take their meals at hotels or restaurants. The colonel, so the witness testified, said Mrs. Herbert was a "wonderful little girl"; that he intended to see that she was well paid for she was wonderful to him; he said she did his buying, such as socks; she always fixed his eggs and spinach to suit him. She had seen him being undressed on three or four occasions. She had seen Mrs. Herbert assist him in putting on and removing his trousers and clothing, and taking him to the toilet. His breakfast was often served to him while he was in bed. Mrs. Clark said the colonel particularly liked the way she [Mrs. Clark] cooked corn and beans, southern style. She said she took him flowers when she visited him at the Biltmore, and on one or two occasions she took him some of her home cooking.

Miss Ruth Belle Allen, a married woman who retained her maiden name, is a daughter of Mrs. Isabel H. Clark. She met the colonel for the first time the latter part of August, 1927, less than two months before the instrument in question is alleged to have been executed. He came with Mrs. Herbert to the hospital two or three times where she was interned for a short time on account of illness. The colonel told her that he had recently returned from Paris. On September 8, Mrs. Herbert and the colonel came to tell her goodbye, as they were leaving for Vancouver on a trip. The colonel said: "When we get back, come and stay with Mrs. Herbert and we will go somewhere." When they came back Mrs. Herbert called her and she went to Mrs. Herbert's apartment opposite the colonel's at the Engstrum. On October 2, the three went by train to Palm Springs. She said she remembered once or twice having heard him say he was going to his attorney's office. They went to shows every night. He suggested going and he bought the tickets. They never stayed through a single picture. He always got tired and wanted to go home. He didn't like the show and said he didn't want to stay any longer. Mrs. Herbert usually prepared his meals in her apartment. She would assist him in dressing and help put on his coat and hand him his hat and cane. After he got in bed she would go in and say good night to him. She prepared his laundry and his linen. She massaged his neck and feet. He complained of cold feet. When he ate his breakfast in his room he would sit on the edge of the bed, dressed in his robe. He took a nap nearly every afternoon. Before they left for Palm Springs the witness was alone with him while Mrs. Herbert was shopping. They discussed Mrs Herbert. Her testimony was that Mrs. Herbert was "so considerate of him, that he never had to ask her to do anything, that she thought of it before he even asked her." He did not know how he could do without her; that his recent trip to Europe was a failure, and that he did not enjoy it because he didn't have anyone to take care of him. He said he was not paying her but he was going to pay her for what she had done. The witness said that during the few days they were there—from the second to the sixth of October—Mrs. Herbert washed his linen and brushed his clothes and did the cooking and housework. They did not take many things. The colonel took a bag. She said "he always wore two or three pairs of stockings; she used to put those on for him and his shoes; and every time he would get up she would run to help him for fear he might need something—which I don't think he did—but she was just considerate of him." He complained of his legs hurting him when he walked, and he took baths at the Indian spring. Dr. Foster (who had been his masseur during many years) took him to the spring. Dr. Foster arrived at Palm Springs by automobile two days before the colonel and the witness left. Dr. Foster took Mrs. Herbert into town and he and Mrs. Herbert left the same night by automobile. The witness then described a walk which she took with the colonel, during which he unveiled his secret thoughts and purposes to her, an acquaintance of less than two months' duration. While taking this walk, she said the colonel confided to her that he was lonesome without Mrs. Herbert. He told her that she had been so good to protect him from people who had designs on him. Her exact words were: "He said 'so many girls and their mothers were trying to get money from him with different schemes for movies, and Mrs. Herbert would not let any of them talk to him.' He said 'she had been so thoughtful and considerate and had protected him from everything of that nature, you know, designing persons is what I mean.' He said 'she had given him more care than his own people and she was more considerate than his own children were and he was going to pay her for it.'" The witness replied that "would be fine." He did not say how much she was to receive nor when he was going to pay her. The witness said she helped him with his shoes, fixed his tie, helped to put on his coat and brushed his clothing that evening, as she had seen Mrs. Herbert do; that she and the colonel took the train the next day and arrived at Los Angeles in the afternoon and went to the Engstrum in a taxi. The witness remained overnight, and the next day, October 8, 1927, she went to Compton, her home, and went back to Mrs. Herbert's apartment at the Engstrum in the afternoon of October 10, the day the instrument is claimed to have been executed. She had a conversation with the colonel upon entering, in the presence of Mrs. Herbert. The colonel was smiling when she came in and he said: "'I told you I was going to pay Mrs. Herbert,' and I said, 'You did, colonel.' He said, 'I have given her a note for a half-million dollars, payable a month after my death.' He said, 'I don't want you to mention this to anyone, Miss Allen'—he called me Ruth. I said, 'I won't.' He said, 'I wouldn't tell you, but I can depend on you not to tell this where people will discuss it.'" He did not say why he did not want it discussed. Mrs. Herbert did not say anything; just smiled. The witness said that she was at Mrs. Herbert's apartment on another occasion when the colonel came in for tea. He was a great tea drinker. Miss Allen stayed a number of nights with Mrs. Herbert. The colonel went back to the Biltmore in October after he returned from Palm Springs. She believed the colonel said that he moved back to the Biltmore because the doctor and his attorney wanted him to move. That once, after he moved away, she, Mrs. Herbert and the colonel went to the Orpheum. She could not fix the date but placed it subsequent to 1927. The colonel always used taxis when she rode with him. At meals he frequently dropped food on his clothing.

On cross-examination she stated that she was thirty years of age and that she had been married, but did not give her married name. She had known Mrs. Herbert intimately since 1925 and she was still very friendly with her. She was visiting Mrs. Herbert and had been for several days before she went with her and the colonel to Palm Springs. She saw Dr. Foster at the Engstrum. He usually came to the colonel's room before the witness was up. She had heard the colonel speak of Dr. Foster coming to his room. The witness said she recollected the colonel said he was going to *pay* Mrs. Herbert for the things she had done. He also used the word *"repay."* He never said he was going to *leave* her anything. The witness finally said that in addition to the services rendered he said he was going to pay her for her *loving kindness,* for her protection of him. She denied on cross-examination that she testified in her direct examination that Mrs. Herbert did any washing for him at Palm Springs during the three or four days that Mrs. Herbert was there. She remained with Mrs. Herbert three or four days after October 10. Mrs. Herbert moved downstairs to the second floor four or five days after October 10. The colonel was left on the fourth floor. The colonel moved to the Biltmore. Mrs. Herbert did not tell her why the colonel moved out. The witness said that once after 1927 she saw the colonel in Mrs. Herbert's room on the second floor. She never saw the colonel after 1927. He died October 16, 1931.

When the colonel requested the witness not to repeat to any one that he had given Mrs. Herbert a note for a half-million dollars, she promised him she would not. She did tell her mother, Mrs. Isabel H. Clark, and Mrs. Herbert three years later, to wit, 1930. Then for the first time she discussed the matter with Mrs. Herbert. The fact that she discussed it was brought out on cross-examination, and the result was that it seriously impaired her credibility as a witness. Her statement made in justification for disclosing the information which she accepted in confidence, as told by her from the witness chair in November, 1933, and was made a matter of record by her sworn statement dated August 7, 1930, which was prepared to meet a future contingency, cannot easily be harmonized with a disinterested state of mind prompted solely by a desire that impartial justice be done.

According to the witness, Mrs. Herbert was present on the afternoon of October 10, 1927, at the time the colonel told the witness that he had given her [Mrs. Herbert] "a note for a half-million dollars payable a month after death," a subject which had never been mentioned by either until August 7, 1930. Her testimony in explanation of her action was that she was going East and did not think she would ever come back to California to live again. She asked Mrs. Herbert if she had heard from the colonel and she said, "No, not lately." She then asked Mrs. Herbert if she wanted her to leave a statement of any kind to the effect that she had heard the colonel say that "he had given her that note." Mrs. Herbert replied: "If you want to. I don't think it is necessary." The witness then said: "Maybe I had better because I don't think I will come back to California to live any more." Mrs. Herbert then said: "All right. You write whatever you think you want to." Then I wrote the statement. The witness said after she had signed it she told Mrs. Herbert that a paper like that should be witnessed. Mrs. Herbert said she didn't think it was necessary. The witness then said: "Let's go to a notary public." The two went to a notary and the instrument was put in the form of a verified statement as follows: "On October 10, 1927, while I was visiting Irene Herbert or Mrs. Edres Herbert at her apartment at the Engstrum Bldg. at 5th and Grand St., Los Angeles, Calif., Col. J. B. Lankershim, who was a daily visitor of Mrs. Herbert, signed a promissory note for Five Hundred Thousand dollars in Irene Herbert's favor, payable one month after his death. He, in my presence, many times said he would leave Irene well fixed for her loving kindness and protection to him. The Col. willingly, agreeably, signed the note at this time.

"8-7-30 Ruth B. Allen.

"Subscribed and sworn to before me, a Notary Public in and for Los Angeles County, California.

"J. W. Ray, Notary Public.

"My Commission Expires August 2nd, 1932."

The witness had never seen the disputed document, but on cross-examination she testified that the colonel said he was going to *pay* her [Mrs. Herbert] for her *loving kindness and protection.* She also remembered he told her that the note was *"payable one month* after death." This was after the lapse of three years. This *language* is embodied in the instrument. The inference to be drawn from the above sworn statement is that she (Miss Allen) *knew* that he signed a "promissory note," not that she was told so by him. Indeed, taken by itself, it is subject to the inference that she saw him sign it. She then avers that he "willingly, agreeably *signed* the note" at the time. As a witness three years later she admitted she was not present when the alleged transaction took place. Her averments of August, 1930, also flatly contradict the persistent denials which she made at the trial that the colonel ever said that he was going to *leave* Mrs. Herbert anything, but he always said he was going to *pay* her for her services and he did not once use the word *"leave"* with resepect to such services. She said that Mrs. Herbert did not make any suggestion as to what she should incorporate in her statement. The witness changed her testimony to the effect that Mrs. Herbert washed the colonel's linen at Palm Springs to a negation of that statement. At the Engstrum she saw her wash his clothing, but she would not say more than once.

Louis A. Duni, a private investigator and a former deputy United States marshal, and afterward an investigator in the district attorney's office at Los Angeles, called by appellants, testified that he visited Miss Ruth

B. Allen at her home in June, 1933, and she, in the presence of her stepfather, Ivy C. Clark, and W. W. Wallace, who accompanied him, admitted that she wrote said statement at the dictation of Mrs. Herbert. Mr. Wallace, an attorney at law and connected with the law offices of J. Wiseman Macdonald, corroborated this testimony.

Frank D. Allen, a son of Mrs. Isabel H. Clark and brother of Ruth Belle Allen, testified that he had known Mrs. Herbert about nine years, and Colonel Lankershim since 1925. He first met him at Mrs. Frances Blood's house, corner of Garland and Eighth streets. The colonel went to Europe every year in the late spring. He called on him at the Engstrum and at the Biltmore. On his first visit to the colonel's rooms, Mrs. Chaplin was with him. Sally Pepper and Mrs. Herbert were there. The next visit was made two weeks later. Mrs. Chaplin was with him again on this visit. Mrs. Herbert and three or four other women were in his apartment. He would, when downtown, often run in to see the colonel and say "hello." He visited him ten or twelve times when he was at the Biltmore. In August, 1927, he was in his room about two hours, trying to sell him a piece of property. He was not successful. No one else was present. Mrs. Herbert had gone to the Engstrum to make a little soup. The colonel said he did not know what he would do without her; that she had been a lot of help to him; that she was always very kind about fixing the kind of food he liked and he said she would be well paid for her services; he didn't know what he would do if he didn't have somebody like her to fix his food for him; that she suited him right; he said he liked very weak tea and a lot of it, that it made his kidneys function. He spoke quite often of what Mrs. Herbert had done for him. The witness said he saw the colonel at Mrs. Chaplin's and at Sally's. Mrs. Herbert was usually with him. She would always help him to the toilet. He wore some kind of a belt or supporter around his abdomen. He wore wool socks. He saw Mrs. Herbert give him medicine three or four times; saw her help him put on his trousers. "He was kind of feeble." Very heavy. Mrs. Herbert generally massaged the back of his head. He saw him in 1929 every two or three days at the Athletic Club, when he came to lunch with his son and daughter or Dr. Foster. He would generally ask "how Mrs. Herbert was or if I had seen her." He said Dr. Foster was taking care of him. In his visits to the Biltmore the witness saw Dr. Foster not more than once. He knew Dr. Foster was his attendant and had probably been his attendant for six years prior to 1929. When the witness saw the colonel at the Athletic Club where he was stopping it was only for a few minutes in passing. He had no extended conversation with him after October, 1927.

Mrs. Sarah L. Barrett, a witness for plaintiff, had known Mrs. Herbert since 1924, at which time she came to her flat on Garland and Eighth streets and lived with Adele Blood and her mother. They occupied the flat three or four years, dating from the fall of 1924. She saw Mrs. Herbert at Mrs. Blood's flat every day in 1924, 1925 and 1926, except when she went to the beach; saw Colonel Lankershim at Mrs. Blood's flat at least three times a week. Sometimes a chauffeur brought him, and sometimes Mrs. Herbert brought him. Visited him three or four times at the Biltmore during 1924-1927. Went with Mrs. Herbert to the Biltmore in 1925 to help Mrs. Herbert carry some soup and vegetables and prunes. The witness saw Mrs. Hope prepare the articles in her kitchen. After arriving at the Biltmore Mrs. Herbert gave the colonel some sort of medicine. He was sitting in a chair with a blanket wrapped around him. At Mrs. Blood's flat on one occasion, before departing for the beach, she heard the colonel say Mrs. Herbert had taken wonderful care of him and he was contented and happy since she had been taking care of him and he was going to see that she was well repaid for all she had done for him. At one time she saw Mrs. Herbert mending stockings which she understood were the colonel's silk stockings. Never saw her do anything else in that respect. The colonel once took Mrs. Herbert and the witness and a group of her friends in his limousine to Beverly Hills and to the beach for dinner. The colonel spoke of Mrs. Herbert's kindness and care. The witness instanced another day when she went to the hotel with Mrs. Herbert, who had bought some chicken and soup and took it to the colonel. She related a third and fourth occasion when soup and chicken were cooked by one or the other and taken to the colonel's rooms. Mrs. Herbert stayed at the Garland street flat in Mrs. Blood's apartment until the spring of 1927. Adele Blood was there part of the time.

Mrs. Herbert always went to the beach in the summertime. The colonel went to Paris every year and stayed several months. Mrs. Blood and the colonel were great friends and it was not easy for the witness to say whether he came to see Mrs. Herbert or Mrs. Blood. She finally said he came to see Mrs. Herbert as she was caring for him. She said that the colonel seemed to have perfect confidence in Mrs. Herbert. When the colonel returned from Europe Mrs. Herbert would return from the beach to the Blood flat. Except during the summer months, Mrs. Herbert was at the Garland street flats all day, except when she went to the Biltmore. The colonel said he was going to leave her something but he did not state the amount. Her testimony as to her kindness and care of him and that he would see that she was repaid for the same was along the same tenor as the testimony given by Adele Blood Hope, Mrs. Isabel H. Clark, and others who testified in plaintiff's case.

The plaintiff called as a witness H. Gordon Bayliss, a Los Angeles physician. He had previously known Colonel Lankershim, but met Mrs. Herbert for the first time in 1927 on a steamer with Colonel Lankershim going from Seattle to Vancouver. The doctor was taking Senator Clark's sister to Victoria. Her nurse was accompanying her. The colonel and the doctor were thrown in conversation and Mrs. Herbert came up and had in her hand a pocketbook or purse containing money, and she said to the colonel that he had left his purse in the washroom and she brought it to him. When she stepped away the doctor said he was very fortunate to have a woman like that to take care of him, look after him. The colonel said yes, he didn't know what he would do without her. Mrs. Clark had also stepped away and the colonel said: "'You seem to have a very wealthy woman in your charge. Is it very expensive, is she paying you well?' And I said, 'No, I am only charging my regular price.' Then I said, 'Is your nurse very expensive, cost you much?' And he remarked, 'No, I am not paying her scarcely anything now, but I expect to make it up to her all right later on.'" The colonel told the doctor that Mrs. Herbert looked after him in every way and had been with him three or four years. At dinner Mrs. Herbert had hold of his arm; he seemed a little uncertain on his feet. She got him his overcoat and readjusted a steamer robe which covered his feet. From the above, it would seem that the colonel had a keen interest as to the value of services.

Dr. George L. Cole was called by someone to visit the colonel at his apartments at the Biltmore on February 23, 1927. Mrs. Herbert was in the apartment when he called. The doctor prescribed some kind of a tablet for the colonel to take and suggested that he have a nurse. The colonel replied that Mrs. Herbert would take care of him.

Ethel Anspaker, a resident of Long Beach, had known Mrs. Herbert some eighteen years. The colonel and Mrs. Herbert came to her home in an automobile several times in 1926. She had a family of six children living with her. At one time he bought a set of dishes and Hallowe'en candy for the children. Mrs. Herbert helped him up to the doorsteps. He had tea. The witness made it and Mrs. Herbert served it. The latter saw that he was made comfortable. The colonel said the witness was very fortunate to have the children, as when she reached old age and needed help and assistance it would be given through love; that he was "old and ill and had to employ people to take care of him, but I would be compensated through raising a family."

[3] Mrs. Irene Herbert, being a party to an action upon a claim against an estate, was barred by virtue of the provisions of section 1880, subdivision 3, Code of Civil Procedure, from testifying to any fact occurring before the death of decedent Lankershim.

She was sworn, however, as a witness in her own behalf and testified that she was then forty-three years of age and knew Colonel Lankershim in his lifetime. At this point an objection to her testifying on statutory grounds was made and overruled. She was shown the disputed document and identified it as the one set forth in the pleadings. She also testified that she presented a claim on the instrument for the sum of $500,000 and that it had not been paid. The witness said she read the prepared claim before she presented it but she did not know whether she verified the complaint or not. Her counsel offered to stipulate that she did, but opposing counsel refused to accept the stipulation, stating that he preferred to have the witness testify on the subject. The above was the extent of her testimony in chief. She was recalled at the close of defendants' case on rebuttal. The experts had testified that the paper upon which the note was written had been folded before Mrs. Herbert wrote any part of the body of the instrument. This, it was contended, was made physically manifest by ink penetrations and spreading of ink as the pen crossed the crease made by the fold. No expert who testified on the subject had any doubt as to the physical fact. Miss McKee had early testified that the note was perfectly flat and had not been folded when she handled it. Clark Sellers testified that shortly before the trial day and at a time when the experts were making scientific tests of the genuineness of the document in the offices of plaintiff's counsel, Lieutenant of Police H. C. Nutt, Mrs. Herbert and Miss McKee being present, plaintiff was asked by Clark Sellers if the fold which extended from the top to the bottom of the document was on the document when she wrote it and she said the document was flat, unfolded, and she folded it and put the crease in it after she had written the body of the document. Lieutenant H. C. Nutt, supervisor of the crime investigation laboratory and a specialist in the investigation of questioned documents, who was at the time examining the document, corroborated Clark Sellers. He further added that Mrs. Herbert, after stating that the note was flat and smooth when the colonel handed it to her, declared that he admonished her to "take good care of this note because it was valuable." She further said: "I placed this note in a passport folder and carried it in this folder flat for some five of six months. At that time I noticed the end had become torn somewhat, and that the ends were becoming frayed, and at that time I folded the note in the center or middle and carried it that way in the passport folder until such time as I delivered it, or showed it, rather, to Mr. Macdonald."

On rebuttal Mrs. Herbert was asked if she ever carried the note in her purse and she answered that she had for several days at a time and that it was not in any kind of a covering folder or envelope at any time. She was then asked if Mr. Sellers asked her if it had been folded before she wrote on it and she answered: "No." She said the subject of folding the note was not discussed. Miss McKee, also a rebuttal witness, testified that the fold in the center of the paper was not mentioned by anyone during the two periods at which she was present during the investigation made testing the genuineness of the document. Mrs. Herbert did not deny or affirm the controverted question as to whether the paper had been folded before she wrote the alleged dictation. She explained other matters in connection with the physical appearance of the note, but she did not deny the claim that the paper had been folded before it was written upon by her. If carried in a purse without covering or protection of any kind through a period of four years it must have become at least badly crumpled and wrinkled at the end of that period.

The foregoing summary of the testimony states the full strength of plaintiff's case as made out by the parol evidence of the witnesses offered by her. The documentary evidence, particularly photographic copies of the questioned document, is now before the court for inspection in form and size of the original and also in enlarged sizes, together with exemplars of decedent's handwriting for purposes of illustration in other matters pertinent to the bona fides of said instrument. The witnesses used as handwriting experts and also to make chemical analyses of the ink used in producing the instrument (two of whom were called by the defense and two others were named by the court) gave adverse testimony as to the integrity of the instrument.

Appellants contend that a conspiracy was conceived by Adele Blood Hope and Mrs. Herbert, actively aided and abetted by Stella McKee, Mrs. Isabel H. Clark, Miss Ruth Belle Allen, and Frank Allen, all but one being companions of Mrs. Herbert, to establish as genuine a spurious claim against said J. B. Lankershim's estate and set about to devise a plan of sharing in his estate; that in consummating said plan it was necessary that it be done secretly and in such fashion that the evidentiary facts upon which said parties were to rely should be confined to the knowledge only of the parties themselves, thereby rendering it impossible to impeach the testimony of any one of them by direct evidence, Colonel Lankershim being dead. It is argued that the only way by which plaintiff and those who acted in concert with her could succeed in their design was to adopt a plan whereby payment of the claim would be deferred until after death. It is further argued with great force that the normal, usual and businesslike way in which men dispose of large fortunes is by will, by trust arrangement, or at least by adopting some method which would place the stamp of verity upon their acts, and if not so conforming to testamentary rules and prescribed forms of law, they at least would safeguard their ante-mortem wishes with suitable barriers to withstand anticipated attack. Colonel Lankershim took the precaution to make a will in which he made no provision that plaintiff should share in his estate. Neither did he establish a trust fund or make any provision for the immediate payment of any sum by check or order. Any of said methods would have furnished some substantial evidence in support of the authenticity of his act. Neither Colonel Lankershim's legal and business adviser and business associate, who was one of the executors of his estate, nor his daughter, son or confidential secretaries have any knowledge of the note transaction. Miss McKee testified that the colonel told Mrs. Herbert to deposit the note in a bank; that it was very valuable. Instead, she testified she carried it loosely placed in her purse and passport folder for more than four years. Miss McKee said that the colonel instructed Mrs. Herbert to take the note to J. Wiseman Macdonald after his death and he would see that it was paid. Miss Blood also testified that the colonel, in recounting to her what he had done for Mrs. Herbert, said it would be "one of the real regrets of his life that he would not be here to see Mr. Macdonald's face when he saw the note." This occurred in February, 1928, at the time the colonel had been sharply taken to task by Miss Blood for not having provided for Mrs. Herbert in accordance with her desires. Miss Blood testified that when the colonel told her he had not given her money but a note "payable one month after death," she said to him that she was "amazed," and she further said to him that she thought "it was a very silly thing, it would be very much better if he had given her money while he was alive instead of giving a note payable after his death." This was a very natural and pertinent observation.

Mr. Macdonald, his attorney, advisor, and the manager of the Lankershim Estate Corporation, when called upon to prepare decedent's last will and testament, had not the faintest hint that an outstanding claim in the sum of $500,000 evidenced in the manner shown by the evidence was to be uncovered for the first time in the settlement of the estate. It is scarcely conceivable that a successful business man of wide and varied experience, in the circumstances of the case presented, would leave his executor and business manager in total ignorance as to the bona fides of a claim of such proportions without realizing that it would beyond doubt, from the nature of the transaction, meet with rejection by the person whom he had appointed by his testamentary act to pass upon it. It certainly would seem that the decedent would have adopted similar safeguards against the miscarriage of his desires with respect to Mrs. Herbert which he adopted with respect to his own children if he intended she should participate in his estate, particularly if the imputation of Stella McKee, Miss Blood, Mrs. Clark, and Miss Allen to the effect that he placed Mrs. Herbert as having gained favor over his wife, son, and daughter, is to be credited.

By the words of the colonel himself as related by the witness called to establish the execution of the questioned document—Miss McKee—corroborated by witness Frank D. Allen, the colonel had in his employ at the very time of the execution of said instrument and had had for several years prior thereto, Dr. Foster, a trained masseur and attendant, who personally served him to the end of his days. Miss McKee said that on the morning that she and Mrs. Herbert entered the colonel's room he appeared disappointed that Dr. Foster was tardy and he was highly displeased that the person whom he *paid* to give him treatments had not yet made his appearance. Frank D. Allen, another of plaintiff's witnesses, gave testimony that he had information to the effect that Dr. Foster had been rendering personal services for the colonel for several years.

It cannot be successfully contended that Mrs. Herbert rendered requested services under any express agreement of employment. She had no fixed hours of employment or definite duties, and the evidence does not satisfactorily support a finding or an inference that she conducted herself or regarded herself as a hired employee or acted in the capacity of a nurse, masseur, or paid companion. During the period for which compensation is claimed, 1924-1927, both inclusive, Colonel Lankershim spent practically one-half the time in company with his wife and daughter in Europe, and Mrs. Herbert's witnesses do not claim that she was in his company except upon the occasions stated by the witnesses testifying in her behalf while he was living at the Biltmore Hotel. Bills for theater tickets, dinners, taxi charges and for other amusements and entertainment during a period of some three months prior to October 10, 1927, show beyond question that the colonel was the host for the pleasure of his guests, who were friends and companions of the plaintiff, on numerous occasions. Besides, he paid all of Mrs. Herbert's expenses while she was living at the Engstrum, and also her expenses for a trip to New York where she visited with her friend, Miss Blood, and to Vancouver, B. C., which latter trip was completed but a few days before October 10, 1927. Colonel Lankershim was a generous host, and no doubt paid many hundreds of dollars, which do not appear in evidence, for the pleasure and amusement of his women guests during the period embraced within the inquiry. According to the uncontradicted testimony of H. O. Moulton, bookkeeper for the Lankershim estate, he carried to him during his short stay at the Engstrum, occupying apartments opposite Mrs. Herbert's room, pocket money, the occasions and amounts he did not recall, but his usual amount for such purposes was from $200 to $500. The foregoing is a full résumé of all the oral evidence presented by plaintiff and states the full strength of her case.

It is the contention of appellants that the evidence offered to prove respondent's case is patently insubstantial and is too inherently improbable to entitle it to be used as the basis of a judgment in an important cause. It is further urged that respondent relies upon the weakest kind of evidence known in the law, to wit, alleged declarations of Colonel Lankershim, since deceased, to support her judgment. Appellants also contend that the declarations testified to by Mrs. Adele Blood Hope and Miss Ruth Belle Allen are entirely nullified by the recorded words of decedent which appear in his correspondence with his wife and daughter and which will later be set forth at considerable length. In addition to the specifications as to the insufficiency of the evidence, questions of law will be given consideration; but before doing so we will complete the review of the evidence with a summarizing of that adduced on behalf of the appellants.

There can be no doubt that Colonel Lankershim was afflicted during the closing years of his life with atrophy or degeneration of the optic nerve, a progressive disease which often comes with old age. Dr. George H. Kress, an eye specialist, began treating him November 1, 1927. His testimony was that when he examined his right eye on that day he was not able to distinguish a raised finger removed more than one foot from his face. The visual capacity of his left eye was reduced from one hundred percent, the standard, to between thirty-five and forty percent. That was the extent to which he could see into distance. With his right eye he could see nothing in distance. The specialist said he always came with an attendant, and his gait was that of a man who did not see well, and he was guided by an assistant. He told the doctor that when he was in Paris in 1927, a few months prior to October 10, 1927, he was informed that he had cataracts and his vision was poor. He said he could not see. Examinations of his eyes showed a disintegrating condition that foretold approaching blindness. In the opinion of the specialist, Colonel Lankershim was not able to read the disputed document on October 10, 1927, with the naked eye. With fitted glasses he would not have been able to read the entire document at one reading operation. Notwithstanding the opinion of Miss McKee, Miss Blood, and one or two others who testified that his eyesight was good, the fact is that practically every witness for the plaintiff, including Mrs. Herbert herself, in enumerating the compensatory services which she performed, included as an item of service "reading" to the colonel. His bookkeeper, Mr. Moulton, testified that the colonel's eyesight began to signally fail in the latter part of 1926. He used a large magnifying glass about six inches in diameter to assist him in reading. His business and his private letters from his wife and daughter were read to him by his confidential secretaries. He signed some checks, but Mr. Moulton usually signed them. It was necessary in signing his name for someone to guide or direct his hand to the proper place for his signature. Often he would run off the line. After 1926 he did not attempt to write letters. Miss Alice E. Tufts, secretary of the Lanskershim Estate Company for thirty-five years, saw the colonel practically every working day when he was in the city. He went to Europe every year in the spring and returned in the fall. In 1926 his eyesight failed him greatly. She purchased the magnifying glass mentioned by Mr. Moulton. Prior to 1925 he wrote weekly to his wife and daughter personally, after that period the witness took dictation and transcribed his letters. She identified approximately 100 carbon copies of letters dictated by the colonel to his wife and daughter during the years 1926 and 1927, one of which was dated the day after October 10, 1927. Others were written several days apart, both before and after October 10, 1927. The letters written to them by him express affection and concern for the members of his family. A few of these letters will be noted later.

Miss Tuft's office adjoined the private office occupied by the colonel, with a connecting door. She had observed the condition of the colonel's eyesight since 1920. In 1926 it failed very much. He had difficulty in reading and had the witness purchase the magnifying glass above mentioned. The witness frequently mailed letters written by him to his wife and daughter. Beginning with 1925, all of the colonel's letters from his wife and daughter were read to him by his secretaries. The witness was shown an unsigned letter written from Vichy and addressed to Mrs. Herbert, in care of Mrs. Adele Blood, the greater portion of which was typed but to which a few lines were added in longhand which she said may have been written by the colonel, but if it was written by him he probably had some kind of assistance such as a high-power glass. The letter briefly referred to his return trip and to other matters which sufficiently identify it as being a communication from the colonel to Mrs. Herbert. The written portion of the letter makes inquiry of the address of a lady living on Riverside Drive, and also the address of a lady who had downtown flats. The letters forming his words are frequently unconnected and stand alone. The alignment is fairly good. The other two letters, one mailed at Vichy July 19, 1927, and the other mailed from Paris July 28, 1927, are in typewriting and bear the colonel's signature, the surname being divided into three sections. Said letters have to do principally with his return to Los Angeles, and make references to the weather, his health, with directions as to his address, and greetings to friends generally, with special mention of Miss Blood. A number of checks collected by plaintiff were introduced bearing the colonel's signature before and after October 10, 1927. Some of the signatures are on the ruled lines and are well written, while others indicate a hand not sufficiently guided by good eyesight. One instance of poor vision is evidenced by a check dated October 20, 1927, ten days after the transaction in question. The only letters at all legible in his signature are "J. B." The upper part of the loop in the letter "L" is discernible, but one not familiar with the circumstances would be wholly unable to reconstruct his or any signature. Evidently the ink had ceased to flow from his pen and his eyes were unable to tell him that his pen was not registering. A few broken and incomplete ink lines which follow immediately indicate that the eyesight had failed and by force of habit of many years he had gone through the arm motion of writing his name. Three checks bearing his name and dated October 10, 1927, are in evidence. One for $33.50 payable to American Radium Products Co. is so greatly superior in execution as to distinguish it from his other signatures. The second shows a failure of the ink to register in places and the third which is made payable to the Engstrum Apartments in the sum of $214.88 is typical of other signatures already discussed. His secretaries say that wherever his name appears signed in the proper place on any note, check, bill or instrument subsequent to 1925, either his hand was directed by another or it so happened by accident. The testimony of his theater and moving picture guests to the effect that he said he "had to be seated" in the second or third row leaves no doubt as to seriously impaired vision. The testimony of Miss McKee, Dr. Foster and others is that Mrs. Herbert or whoever was with him, took his arm to guide his steps when he was on the street.

Ivy C. Clark, husband of Mrs. Isabel H. Clark and stepfather of Ruth Belle Allen and Frank D. Allen, first met Mrs. Herbert at the Biltmore in 1926. He testified that he first met Colonel Lankershim in 1926, also at the Biltmore, when he was ill. His stepson, Frank Allen, was insistent that he and his mother go up and meet the colonel, so they decided to go up, and took some flowers. He met Mrs. Herbert at that time, and on a number of occasions thereafter. During the latter part of August or the first part of September he received a telephone call from Mrs. Herbert, and in response to it he and Mrs Clark called at the Biltmore. Mrs. Blood was there but the colonel was not present. When the colonel came in he ordered lunch brought to the room. After lunch another lady came in who said she was an old friend of the colonel and she was interested in something the colonel had brought from Europe. This lady and the colonel went into another room to view some exhibits, and while they were out something was said about the colonel making a nuncupative will. He (Clark) stated that Mrs. Herbert said she and Mrs. Blood had been to New York and made a contact with an attorney who said that if three persons would testify to the fact that the colonel said he was going to leave Mrs. Herbert a certain amount, it would be legal. The witness said he questioned the proposition but Mrs. Herbert said it was so. The witness then said to her if he was going to make her the recipient of this estate, why not have him go down to his attorney and have him make a will and sign it, properly drawn up. She said: "That is the idea, but I cannot get the old devil to do it." Then the witness said: "That is all right. If that is the will of the colonel there is no reason why he (Clark) should not say it." The colonel then came in and Mrs. Blood said: "Colonel, it looks as if it were getting about time you were going to fix up what you were going to leave Irene." He said: "There is plenty of time. I will take it up with my attorney." Prior to this time Mrs. Herbert had often said when visiting the witness's home that the colonel had promised to leave her something; there was no stipulated amount. When she went to the Biltmore he (Clark) was invited to lunch. The colonel had returned from Europe and Mrs. Herbert said he wanted to see him and his wife. Someone had said they talked to a lawyer about the colonel making a will. The witness said he had been a preacher in his younger days and he and Mrs. Clark had spent a good many years among the American Indians. He did the harvesting of crops and his wife did the preaching. He liked the colonel and he thought he was a very intelligent man to talk with. They discussed the condition of Europe, the international bankers and the war debt all afternoon. He thought the colonel had a positive mind and was not easily talked out of his position. The witness tried to sell him some property once, as did others; but he said he would have to consult his attorney first. He reported that he consulted him and after talking it over they decided not to purchase. When he left Mr. Macdonald's law office Mr. Macdonald shook hands with him and said: "We won't question but what Mrs. Herbert was very good to the old gentleman and is due some consideration." The witness said Mrs. Herbert had told him that the colonel was going to take care of her. The colonel did not say "anything about doing anything for Mrs. Herbert. He just answered that when Mrs. Blood asked him." The question of a holographic or nuncupative will was discussed in the colonel's absence by Mrs. Herbert, Mrs. Blood, and the witness, but he was of the view that Mrs. Herbert did not state that he was to make such a will.

Fred M. Foster, the masseur and attendant, often referred to in the case as Dr. Foster, testified that he had been in the colonel's employ since 1920 to the time of his last illness; he gave him a treatment every morning between six and seven o'clock, which consisted of massage and bath; gave him bodily treatments for the bowels and bladder not necessary to relate, and he applied treatment to his eyes and otherwise administered to his needs. He often took breakfast and stayed until noon or later; looked after his clothes, sent his suits to the cleaners and his linen to the laundry, and kept his wardrobe in order; ran errands, made purchases of wearing apparel, read the newspapers to him and drove his automobile quite frequently for him; in 1927 read to him practically every morning and evening and often accompanied him to his office; from 1924 to 1927 the colonel was quite often ill and sometimes remained in bed for a few days. His eyes went bad in the fall of 1927. The witness moved the colonel from the Biltmore to the Engstrum in September, 1927, and moved him out in November, 1927. He did not remember ever seeing Mrs. Herbert in the colonel's apartment at the Biltmore. He saw her on the mezzanine floor and galleria. He saw her frequently in the colonel's room at the Engstrum. He was familiar with the dresser and all the furniture in the colonel's room. He had reason to open the drawers where he kept his personal effects but he never saw checks, paper, pen, blotter, or ink in his room. The witness said he performed the same personal services for the colonel that he always had performed during the time he was at the Engstrum. The witness was at Palm Springs while the colonel, Mrs. Herbert and Miss Allen were there, and accompanied Mrs. Herbert back to Los Angeles. The witness accompanied the colonel on his visits to Paris in 1928, 1929, 1930, and 1931.

[4] The appellants offered to prove, after an adverse ruling by the court, that on the forenoon of November 4, 1927,

at the time that Dr. Foster was moving the colonel's effects from the Engstrum back to the Biltmore Hotel, Mrs. Herbert said to Foster: "I have got free of the doddering old fool; I have kicked him out." An objection was sustained as to the offer on the ground that the evidence was immaterial.

The record is replete with declarations favorable to plaintiffs, admitted over appellants' objections that said declarations were hearsay and self-serving. The excluded declaration was made three weeks after the date of the disputed document. According to her own claim, her services were to continue to January 1, 1928. It was a declaration which, if believed, was inconsistent with and contradictory of plaintiff's case, which was largely founded upon the "loving kindness and protection" clause of said document. It was also admissible as tending to impeach the testimony of certain witnesses as to the tender care and vigilant service Mrs. Herbert rendered in the colonel's behalf. It was also material matter for consideration in the determination of whether a person who had received a princely gift but a short time before would thus angrily turn against her benefactor. There is no doubt as to its materiality and its exclusion constituted prejudicial error.

[5] There is no question but that a very wide latitude should be given as to the introduction of evidence in cases involving issues of the kind presented in this proceeding. Obviously, the nature of the transaction justifies the indulgence of considerable liberality in the admission of any evidence which would shed light on the relation existing between the parties, especially where one of them has since become deceased.

[6] Mrs. Mary C. Hawkins was the switchboard operator and clerk at the Engstrum Apartments in 1927. Her duties were bookkeeping, attending to the wants of the guests, seeing them as they came in and went out, and taking care of their business. Every one who came in or went out passed by her. Mrs. Herbert came to the Engstrum Apartments in the middle of August, 1927. She occupied a room on the first floor. Colonel Lankershim came about September 1, 1927, and occupied a double apartment on the fourth floor. The day after he came, Mrs. Herbert moved to a room directly opposite the colonel's. She stayed there until the middle of October and said she wanted to be moved away from that apartment. She was changed to the second floor and stayed there until the colonel moved out, which was about the first of November. All items of Mrs. Herbert's rent were charged to and paid by Colonel Lankershim. When she testified that Mrs. Herbert asked that she be transferred from her room opposite Colonel Lankershim's, she was asked by counsel for appellant this question: "Did she say why?" An objection was made to the question on the ground that it was irrelevant, incompetent, immaterial and hearsay. Counsel for appellants then made an offer of proof that, if the witness had been permitted to answer, her answer would have been as follows: "Mrs. Herbert, on October 15, 1927, came to me at the desk and said she would have to make a change, that the colonel was coming into her room in his bathrobe and embarrassing her before her guests and annoying her at all times and she could not stand it any longer and that she wanted to be removed away and wanted a room in another part of the building." The court sustained the objection, both as to the question and offer of proof. This ruling was prejudicial error. In the first place, it was a declaration against the whole theory of plaintiff's case and it was admissible as impeachment of the testimony as to the kind and sympathetic feelings which plaintiff had for the colonel. This was but five days after the tenth of October transaction is claimed to have taken place. It was entirely proper for the jury to take into consideration, if they believed the witness, whether it was at all probable that Mrs. Herbert would have made such a statement had she in fact been made the recent recipient of a $500,000 note; or, if she made said statement, was it because of resentment stirred by disappointment in not being able to accomplish her purpose? At that exact time, if the story told by plaintiff's witnesses is to be believed, she had in her possession an unpaid note, the payment of which depended largely on the favor of the colonel. This presents an issue of fact which was a question for the jury's consideration. A holding that the evidence was hearsay could, for like reason, exclude the major portion of plaintiff's case. In addition to its rebuttal nature, it was admissible as bearing on the question of a statement made against interest. The testimony of Louis A. Duni, offered in impeach-

ment of Miss Allen, and of H. C. Nutt, who testified that Mrs. Herbert told him in the presence of Clark Sellers that at the time the note was written the paper was flat and smooth, was considered earlier in our review of the evidence.

[7] Appellants offered evidence which was sustained on the objection of plaintiff for the purpose of fixing the reasonable value of the alleged services performed by plaintiff, in the event the jury should find that she was entitled to compensation, but the court, after receiving some evidence on the question, finally struck out all the evidence bearing on the subject, holding that it was not an issue in the case, and so instructed the jury. We are of the view that such testimony was properly received in the first instance and that it was error to strike it from the record. We are of the view, as between section 1605 and section 1606, Civil Code, that the latter section is more applicable to the facts of the case (eliminating, of course, the issues of fraud and confidential relations and undue influence) than is the former.

We now come to review the evidence of Miss Doria C. Lankershim, daughter of the decedent, Colonel Lankershim. From 1920 to 1931, she lived in Paris with her mother and Doria's adopted daughter. Her mother died in Paris in 1928. Her father visited her and her mother every year since 1924. He remained with them from three to four months. She was with him every day, making visits outside of Paris and especially at Vichy, which is a health resort where bathing in medicinal waters is the main treatment for the ailing. They often attended theaters and other places of entertainment and amusement in and near the city. The mother, who was practically an invalid, would go when she was able. They rode a good deal in automobiles, as the colonel enjoyed riding through the streets of Paris and the public parks and to neighboring cities. She went with her father to the bank on many occasions in 1926–1927 and she had to direct his hand to the place where he was to sign his name. From 1920 until his death he wrote to her and her mother every week. She identified carbon copies of letters addressed either to her or to her mother bearing dates very near the day the disputed document bears date. One of said letters was written October 11, 1927, the next day after said document is claimed to have been signed by decedent. In this letter he makes mention of his recent visit to Palm Springs and states that he had moved to the Engstrum Apartments, which afforded him more room, and it was near the Biltmore, where he took his meals. He spoke of Jackie, the adopted daughter, and said he was glad she was well and that ma sent her regards. He described a grand opera performance which he had attended in Los Angeles and expressed the opinion that it surpassed the grand operas he had attended in Paris. We quote the paragraph which makes reference to his son "Jack" and the ranch in San Fernando Valley on which he resided: "Jack comes in to lunch with me once every week at least and we talk over business matters in which he is very well posted. I wrote in one of my other letters about the dinner that he gave out at the Ranch House that was very nice; and some of our old friends were there that we used to know at The Lankershim."

He mentioned the fact that when at Palm Springs he visited the town of Indio where he met an old friend and described the town and spoke of the orange and grapefruit industry, and its possibilities. On September 30, 1927, he referred to a birthday party given to Jack at the ranch and described the meal served and the decorations in flowers from the pergola on the ranch and said they were beautiful. He spoke of the ranch house having been remodeled and refurnished. He said Jack was looking well, was attending strictly to business, and he found everything in very good business condition when he came back and he was well satisfied. He made mention that Jack was coming to have lunch with him at the Biltmore and he was looking forward to a very pleasant meeting with him. He said Jack had promised to write to her and her mother. He stated that he received a letter from "mother yesterday and she stated it was getting cooler in Paris, more like winter." He wished to be remembered to Jacqueline and to tell her that he thought of her as often as she thought of him. On November 10, 1927, he acknowledged the daughter's letter of October 27, and was pleased to know that they were so well and happy; that their letters came very regularly and that he was always glad to see them. He said he went to the theaters to pass the time, as he could not see very well; his eyes were not very good and all the pain he formerly had in his face had gone to his eyes and he was not feeling so well at times. He wrote that Jack was in every week to take lunch with him and talk over business. The balance of the letter spoke optimistically of the present and prospective condition of the city and surrounding community, and he predicted that the San Fernando Valley where his son lived was to become a great picture center. On November 5, 1927, he wrote that he had just received a letter which had been delayed some days; he said that Jack took lunch with him the day before and was looking well and was taking an active part in all business with him and they were getting quite "chummy." He said it was certainly very pleasant to have one of his own family working in harmony with him, and he spoke of his interest in "Jackie" and her education. He also said that he received a letter from "mother", in which she stated that she did not receive a letter from him during the week prior, and he replied that it must have been delayed on the road.

In a letter dated September 7, 1927, he wrote of current matters generally and particularly of his affairs and contemplated realty improvements on a large scale. Recently he had visited the ranch with Mr. Macdonald, and Jack showed them everything about the large properties. In fact he said: "Jack takes a great deal of interest in everything and all the matters he undertakes are very well taken care of. It is certainly a great pleasure to me to see how well he attended to business when I was away. He wants to be remembered to you."

A letter dated March 12, 1927, evidently written in answer to one he had received from his daughter, mailed at Monte Carlo, acknowledged the receipt of photographs of the baby and spoke of her pleasing appearance and said he was glad they were so happy. He spoke of having mailed a postal at Palm Springs and said their letters came every week and he was always glad to hear from them, especially from "your little One"; that he was having the baby's picture framed and that Jack had the one framed in which the baby was holding the dog in her arms. He informed his daughter that her mother had written to him that the daughter was going to Monte Carlo soon and he hoped she would have a very pleasant time there. He said Jack gave a New Year's Eve party at the Los Angeles Athletic Club for a few of his friends, and it certainly was very enjoyable; that Jack "always speaks of the Little One and seems to take as much interest in her as any of us." He closed with love to all.

Inasmuch as the evidence is vigorously attacked as being self-contradictory and too inherently weak and improbable to sustain the verdict and judgment, we will give first consideration to that issue. In doing so we will make such deductions from the evidence as are warranted by the facts of the case or which are in accord with the common experience and propensities of mankind, the course of business and the laws which ordinarily direct human action. It cannot be disputed that the attacks made upon the evidence are based on substantial grounds, and a very serious question is presented as to whether, upon analysis, the evidence may be said, as a matter of law, to be sufficient to support the judgment. The appellants are entitled to have their reasons supporting their objections stated. We will, therefore, refer to a few of the grounds set forth and also the reasoning of appellants from established premises which seriously challenge the correctness of the jury's implied findings as to the sufficiency of the evidence to support its verdict.

[8, 9] The letters above reviewed, some addressed to the daughter and others to his wife, indulge in comment as to current matters, but only such parts as bear upon his love and concern for the members of his family are set forth. His recorded words, as shown in letters written near October 10, 1927, compared with his brief notes to Mrs. Herbert, completely refute the insinuation thrown out by Mrs. Adele Blood Hope, Miss Ruth Allen, Mrs. Isabel Clark, and Miss McKee that he was inconsolably "unhappy" when not in the company of Mrs. Herbert and that he "didn't know what he would do without her"; that he was "lonesome" when she was absent; and that his visit to Europe was a "failure" because she was not with him; that she had done more for him during their four years of acquaintance than anybody in the world, including the members of his own family, thereby forcing the inference that Mrs. Herbert had risen to a higher place in his esteem through the kind of association and attention described by the evidence than any other person whom he had ever known; and that he had been influenced by some strange conceit to acknowledge her over wife, daughter, and son. This is hardly the part that one would

be expected to take who, by her own averments, had been employed to "console and sympathize" with her employer "in times of worry and anxiety," and "to protect from artful and designing persons" at all times. The written words which came directly from the decedent at the precise period when Miss Blood and others say he expressed to them a higher esteem for Mrs. Herbert than he did for his wife and children offer a protest to the unnatural imputations of said witnesses testifying on behalf of the employed sympathizer and protector, whose duty it was to promote contentment and happiness in the colonel's life and to permit nothing to disturb or mar the higher regard and serene confidence that was essential for the peace of mind and happiness of the head of a family. Her office was, according to her averments, that of a promoter of happiness and contentment, as well as a protector against intrigue and designing persons. The fact that he spent by choice practically one half of each year on pilgrimages in visiting his wife and daughter and that the portions of the other half could have afforded but little opportunity for association with Mrs. Herbert, in accordance with much uncontradicted evidence, tends to refute the claim that the company of Mrs. Herbert was the first consideration of his life, or that she could have devoted as much time to his comfort and happiness as the testimony of said persons sought to establish. Testimony coming from one's own written declarations is entitled to more serious consideration than is evidence of a secondary or hearsay character as to what a person, since dead, said in life. No written line is to be found, except in the questioned instrument itself, in which the decedent gave any expression to the state of mind which the several witnesses say he revealed orally to them. The few letters he wrote to the plaintiff do not support the claim. They are brief and formal and have to do with commonplace matters, and refer principally to his preparation for his return journey to Los Angeles. The fact that he did go to Europe without the company of the plaintiff, and continued to do so in 1928, 1929, 1930, and 1931 with Mr. Foster as his companion, and the further fact that the plaintiff moved from her room directly opposite to his to a different floor, and the significant fact that the colonel left the Engstrum Apartments a few days after October 10, 1927, and the close personal relations claimed to have theretofore existed became severed from that time forward, which is also true as to every one of the coterie who testified in her behalf, are wholly incompatible with the relation of benefactor and benefactress. After October 10, 1927, those who claimed to have been deeply concerned in his welfare seemed, for some reason, to have lost interest in him. Some never again saw him, although he lived four years thereafter. There is no doubt that Mrs. Herbert was, as were her lady companions, a frequent theater and dinner guest of his and that she partook of his hospitality in large measure and in turn made herself agreeable to him. By her creditor's claim, however, and the testimony of Miss Blood and other companions, it is contended she was in his employ in some capacity, her exact duties not being clearly defined. No serious claim is made that she was his nurse, and, conceding that she did all that is claimed, the service does not by any means assume the character of hourly, daily, weekly, or monthly employment, and at the most it was spread over a period of two years. No person connected with the Biltmore Hotel, where he lived when in the state during the full period covered by this inquiry, and who should have been able to support plaintiff's claim of service, the burden being upon her, was called upon to testify in her behalf, and such evidence as was given on the subject would exclude her from the role of an employee of a servile or domestic type. Her bills at the Engstrum, at the Biltmore, for theater tickets, dinners, automobile and taxi transportation; expenses to Vancouver, New York, Palm Springs, and every place where she or her friends accompanied the colonel, and every known charge, were paid by him. Certain portions of her diary were admitted in evidence and the entries made by her with respect to the Vancouver trip showed beyond question that she traveled as a first-class passenger and performed no services that would reduce her to the rank of a servant. She indulged in all the luxuries enjoyed by persons traveling on first-class trains or steamers and spent much of her leisure in playing the ukulele and engaging in social functions. No item recorded by her in her diary would indicate that she was rendering services for pay, but it amply appears that she was having an exceedingly enjoyable time, attending theaters, enjoying good dinners, and staying at first-class hotels. When she accompanied the colonel to New York, her former home, she remained there a number of days, visiting with her close friend, Adele Blood Hope, and this trip and visit was one of pleasure.

Mrs. Herbert was or had been a married woman, but whether she was a widow or divorced from her husband does not appear. There is some evidence in the case that they were seen together in 1924 or 1925, but all attempts to describe their marital relations were met with objections sustained. Likewise, objection was sustained to an attempt to show that she had been previously married. No background of her past is given, except as shown by the fragmentary references herein recorded.

[10, 11] We have stated the evidence as strongly in plaintiff's favor as the record will warrant, and we have made an extended review of the evidence because of the often applied rule that an appellate court will not interfere with the judgment entered by a fact-finding body when there exists a substantial conflict in evidence. This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence.

[12-14] In consideration of the question as to whether or not there exists a substantial conflict, the fact that the consideration passing from the decedent to the plaintiff was so grossly disproportionate, as the books put it, as to shock the conscience of all men, cannot be laid out of the case; nor can the confidential relations that existed between the parties, in the absence of evidence of independent advice, be disregarded. There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character, such as reasonably supports the judgment as applied to the peculiar facts of the case. The rule announced in Morton v. Mooney et al., 97 Mont. 1, 33 P.(2d) 262, 266, correctly states the rule which has been approved by this court in a number of our decisions. It is thus stated: "While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (Grant v. Chicago, etc., Ry. Co., 78 Mont. 97, 252 P. 382), and, in determining this question, 'the credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. "It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment."'"

[15, 16] The rule in cases such as the one before us is that the court must view the transaction with the "most scrutinizing jealousy." This means, of course, any court in which the issue may be raised. Oral evidence, of which there is no satisfactory independent corroboration, is the weakest kind of evidence known to the law. In Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, 537, this court, in considering the same kind of evidence upon which plaintiff must rely in the instant case, said: "Evidence of the declarations or oral admissions of a party are always received with caution. Code Civ.Proc. § 2061, subd. 4. * * *

"A third inherent weakness to be found in the testimony of Ireland is that it purports to give the statements or declarations of a deceased person. Regarding testimony of this character, this court said: 'The evidence is of oral admissions against interest by a man whose lips are sealed in death. What then does the law say of such evidence (assuming now its admissibility)? The Code of Civil Procedure declares (section 2061, subd. 4) that the evidence of oral admissions of a party ought to be received with caution by the jury. In Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am.St.Rep. 87, this court in bank said, "No weaker kind of testimony could be produced." Again in bank (Austin v. Wilcoxson, 149 Cal. 24, 84 P. 417) this court has said: "It is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory."' Estate of Emerson, 175 Cal. 724, 727, 167 P. 149, 151. We might go on and cite many other authorities, but the above are sufficient for our present purpose."

The only evidence introduced by plaintiff is that given by persons who unquestionably were active participants in an effort, through a long period of time, to induce the decedent by means shown by the record to make the plaintiff a beneficiary of his estate. That such was the purpose is too plain to require argument. He was actually taken to task by Adele Blood Hope on at least one occasion for having failed to comply with her suggestion made to him as to what she thought was a suitable provision for him to make for plaintiff. Every means that was thought likely to accomplish that end was brought to bear upon decedent. That there was concert of action on the part of plaintiff and her companions is all but admitted by them. The pressure was intensely applied beginning with the New York trip and was increased by the subsequent Vancouver and Palm Springs trips and finally spent its force at the Engstrum Apartments on October 10, 1927, or shortly thereafter, when the parting of the ways followed whatever transaction took place on that day. The story of a transaction involving the transfer by said instrument to the enrichment of the plaintiff in the sum of $500,000, in the circumstances related by plaintiff and her witnesses, not only strains the credulity of those expected to accept it, but it would seem to bring into serious question the normal mental condition of a former successful business man who engaged in such a transaction. The contention that the decedent had no independent advice in the matter, especially during the few weeks immediately prior to the transaction, when he was under the surveillance of Mrs. Herbert and her companions at the Engstrum, is rendered probable by plaintiff's witnesses, Miss McKee and Miss Blood. The colonel advised Mrs. Herbert, as he delivered the note to her, to deposit it in the bank, and, after his death, to take it to Mr. Macdonald and he would see that it was paid. Mr. Macdonald had no knowledge of the note until after the colonel's death. Miss Blood testified that the colonel said to her that his only regret was that he would not be able to see Mr. Macdonald's face when the note would come to his attention.

From what has been heretofore said in the review and analysis of the case, the transaction related by plaintiff's witnesses from its genesis to its close cannot be easily explained on any theory consistent with ordinary human action.

The testimony of the only person who claimed to have witnessed the transaction is to the effect that the instrument was the product of one continuous writing operation. This testimony is weakened by the physical facts which appear on the face of the note. It does not require the assistance of an expert to discern them. In addition to the physical facts already pointed out, and which tend to nullify Miss McKee's testimony in material respects, the fifth cipher in "$500,000" is out of line with the third and fourth ciphers, and it is relatively smaller and was evidently blotted. The inserted words "One month" were also evidently blotted. The letter "h" intersects the letter "e" in the word "hundred" just above it. No blotter was used to absorb the ink after writing the word "hundred." The only words or figures which show the use of a blotter at all are "one month" and the fifth cipher. The "after death" clause rendered the note nonnegotiable and therefore postponed an investigation as to its genuineness until after the death of Colonel Lankershim. If a blotter had been used at the time the body of the instrument was written, absorption would have shown in the words adjoining and immediately above and in close proximity to the blotted words. On the contrary, all other writing shows quite black and heavy. If the writing was a continuous process, the ink must have been wet in "hundred" when the blotted words were written and, if so, the extension of the letter "h" into the letter "e" would have produced the usual effect of blurring or running together of the ink. Instead, the letter "e" has the appearance of having been completely dried at the time the letter "h," from underneath, intersected said letter "e." The written words "thousand dollars" have a decided variance in slant of letters from the letters in the preceding words, showing a different writing position. Features upon the face of the instrument give the appearance of alterations made after its execution, noticeably the forcing out of line of the word "me" to avoid writing into the letter "J."

[17, 18] Plaintiff meets this criticism by saying that it was done to avoid writing into the bracket at the end of a ruled line. Appellants respond by pointing out that printed matter, including border lines, did not stay the hand of the writer. The note speaks for itself. The burden of establishing its integrity was upon plaintiff. No evidence was given as to any changes or alterations made in the instrument after it was written except the testimony of Miss McKee. She saw no blotter

used in the production of the instrument, or at all, and the note was flat and had not been folded when she examined it. Its physical appearance indicates that it had been folded before written upon. Her testimony in other respects has been analyzed. Three experts on penmanship and one on analytical chemistry, two of whom were selected by the court, made critical examinations of the document and all are of the opinion that the signature of the decedent and the body of the instrument were written with different inks and at different times. It is insisted that the testimony of said experts is corroborated in several respects by physical facts. The rule is that expert evidence, like other kinds, cannot be arbitrarily disregarded.

[19-25] The rule as to the adequacy of consideration is well stated in 13 Corpus Juris, §§ 237, 238, as follows: "So long as it is something of real value in the eye of the law, whether or not the consideration is adequate to the promise is generally immaterial in the absence of fraud. * * * the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced. It is competent for the parties to make whatever contracts they may please, so long as there is *no fraud* or deception or infringement of law. Hence the fact that the bargain is a hard one will not deprive it of validity." However, this is by no means an inflexible rule, but has exceptions well recognized in the decisions of many of the leading states of the Union, including decisions of the United States Supreme Court. The exceptions exist "where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount both at law and in equity to proof of fraud, oppression and undue influence. So, while it is ordinarily stated to be the rule at law that the adequacy of consideration is not material, a court of law, where the contract is unreasonable and unconscionable, may give a party who sues for the breach, not what the other party promised to pay, but only what plaintiff is honestly and equitably entitled to." This rule of equity strongly appeals to the common sense of justice. Section 239 of the above text, citing authority sustaining the principle announced, states the rule to be that "inadequacy of consideration is often treated *as corroborative evidence of fraud or undue influence* which will enable a promisor to resist a suit for specific performance or have his agreement set aside. Where mental weakness occurs in connection with inadequacy of consideration, the presumption of undue influence becomes very strong. Again, where the parties stand in a *confidential relation,* inadequacy of price will raise a *presumption of fraud.*" (Italics ours.) Inadequacy of consideration may be so excessively gross and unconscionable as to amount to conclusive evidence of fraud. Gross inadequacy of consideration is, therefore, to be considered together with the evidence bearing upon the bona fides of the transaction. This rule better conforms to the more modern and common sense concept of fair and honest dealing. Any other rule would be abhorrent to that sense of justice which finds approval in our best judicial pronouncements.

[26-28] In the state of the evidence in this case it is a very serious question whether, as a matter of law, the evidence adduced by the plaintiff is sufficiently substantial to support the judgment. In cases in which a serious doubt is created in the mind of the reviewing court as to the sufficiency of the evidence to support the judgment, it becomes the duty of the court to carefully consider the errors complained of, and if it should appear upon such consideration that the errors committed probably prejudiced the case of the party against whom they were committed, it is the duty of the court to order a retrial of the cause. In such cases the provisions of article 6, § 4½ of the Constitution cannot be invoked in aid of the affirmance of the judgment, unless it can be said that the justice of the cause preponderated so heavily on the side of the prevailing party that none of such errors did or could have contributed to or resulted in a miscarriage of justice. Construing article 6, § 4½ of the Constitution, this court, in People v. Davis, 210 Cal. 540, 556, 293 P. 32, 39, said: "The phrase 'miscarriage of justice,' used as descriptive of that condition of a cause which justifies the reversal of a judgment, has no hard and fast definition. It seems assured, however, that where errors have been committed, and where the appellate court finds that upon the record it is seriously doubtful that without such errors the defendant would have been convicted, then it may well be that errors which otherwise would not be considered to be seriously prejudicial, will require a reversal." The rule applies

to civil as well as to criminal cases. Tower v. Humboldt Transit Co., 176 Cal. 602, 605, 169 P. 227; Langford v. San Diego El. Ry. Co., 174 Cal. 729, 164 P. 398; Citti v. Bava, 204 Cal. 136, 138, 266 P. 954; Squires v. Riffe, 211 Cal. 370, 374, 295 P. 517; People v. Washburn, 104 Cal.App. 662, 286 P. 711, 714.

Under the doubtful state of the evidence, we are of the view that the case should be reversed for reasons already pointed out and hereafter to be considered.

[29] If the note was intended as a gift payable after death, then, of course, it did not create an enforceable legal obligation. Coon v. Shry, 209 Cal. 612, 289 P. 815; Tracy v. Alvord, 118 Cal. 654, 50 P. 757; Wisler v. Tomb, 169 Cal. 382, 146 P. 876. The note can be upheld, if at all, only as a contract. This is conceded. As a contract, to be enforceable, it must, of course, be supported by a valid consideration. This consideration must be either past or present.

[30] As part of her case respondent offered evidence tending to prove various services intermittently rendered by her, and the length of time over which the services were rendered. According to the evidence produced by her, all of the services were rendered and completed prior to the date of the execution of the note. There is not one word of evidence that services of any kind were rendered after that date. If the note was intended as compensation for the services already rendered, then the provisions of section 1606 of the Civil Code are applicable, and this is so whether the obligation to pay for these past services was either a moral or a legal obligation. That section provides: "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, *to an extent corresponding with the extent of the obligation, but no further or otherwise.*" (Italics supplied.)

[31] It must be admitted that, under this theory, at the time the note was executed the "extent of the obligation" existing against Colonel Lankershim, legally or morally, was to pay for the reasonable value of the services rendered. If this analysis is correct, then the only consideration that can support the document sued upon was this prior obligation, and it can support the document only to the "extent of the obligation, but no further or otherwise." The appellants sought to introduce evidence as to the reasonable value of the services, but this evidence was excluded. The jury was specifically instructed that the respondent, if entitled to recover at all, was entitled to recover the full $500,000. The defendants offered several instructions to the effect that if the jury should find the consideration for the note was past consideration, then the plaintiff was limited in her recovery to the reasonable value of her services. These instructions were refused. This was error of a prejudicial nature. Certainly from the evidence introduced, the jury, if it found services were in fact rendered, could have found that the services already rendered when the note was executed were the sole consideration for the note. The jury should have been instructed that, in the event it so found, recovery was limited to the extent of the existing obligation as defined in section 1606 of the Civil Code. Lagomarsino v. Giannini, 146 Cal. 545, 80 P. 698; Estate of McConnell, 6 Cal.(2d) 493, 58 P.(2d) 639; Moore & Co. v. O'Grady, 9 Cal.App. (2d) 695, 50 P.(2d) 847.

Appellants make complaint that the value of the testimony of the expert witnesses was greatly weakened, if not destroyed, by the many objections made by respondent and, as they contend, improperly sustained. It is also insisted with some force that the examination of these witnesses was unduly curtailed and frequently interrupted by objections which should not have been allowed to the extent that it seriously prejudiced appellants' cause with the jury. That many of the objections were placed on highly technical, if not insubstantial, grounds is not entirely without support. The specific grounds of the objections were that the questions called for the conclusions or inferences of the witnesses or carried them into the realms of speculation or permitted them to make deductions and resort to the inductive method of arriving at conclusions. An examination of the record convinces us that the examination of the opinion witnesses was too narrowly limited. A number of the objections sustained on the grounds stated were not well taken, as the questions called for the opinions of the witnesses on matters within the field of this class of evidence. It may be properly said that ruling upon the admission of such testimony in the course of trial often presents perplexing problems to a trial court.

H. O. Moulton, who had been the bookkeeper in the Lankershim Estate Corporation for a number of years, testified on behalf of defendants as to the failing eyesight of decedent, his manner of signing his name, and as to his traits and his general physical condition. During his examination he said that he had to do, in his employment, with keeping records of all of decedent's properties and that he was familiar with said properties. This designation of duties, plaintiff claimed, opened the door for cross-examination as to his wealth and entitled plaintiff to a listing of all the properties of whatsoever kind owned by decedent in 1927. Accordingly, over the objection of appellants, the witness was directed to furnish lists setting out all real and personal property, including stocks, bonds, and all evidences of debt owned by him. The witness, under the ruling, testified that decedent owned all but two shares of the Lankershim Estate Corporation, the authorized capital of which was $1,000,000. A list of real estate, stocks and bonds covering approximately six printed pages was read into the record. The par value aggregated $1,012,923.31. The market value was not given. This evidence near the close of the case was stricken out as being inadmissible. Upon several occasions during the trial the plaintiff brought to the attention of the jury that Colonel Lankershim was a very wealthy man. This matter was made to appear, by inference, on the cross-examination of witness Sellers, by questions as to the compensation he was to receive. The cross-examination of Dr. Kress, the eye specialist who treated the colonel, did not relate to any matter about which he testified in chief, but had to do with the fees which the oculist had charged him. Without any apparent ground to prompt the question, Mrs. Tufts, secretary of the Lankershim Corporation, was asked if she had ever read to the colonel a letter written by Mrs. Lankershim to her husband in which she signed herself "millionairess." No offer was made to prove that she had written such a letter. Taking into consideration the nature of the action, it is not likely that the jury was able to entirely shut out of mind the long list of real properties, certificates of stocks, bonds, and evidences of wealth which had been read to them. Both counts of the complaint specifically alleged the performance of service as the foundation of the action.

[32] The proffered testimony of defendants as to certain declarations made by plaintiff which tended to rebut the testimony of plaintiff's witnesses given to the effect that she was kind to, sympathetic with, and considerate of the colonel, and was committed to his financial and personal welfare should not have been excluded from the jury's consideration, especially in the face of the fact that plaintiff greatly stressed this particular issue. It was proper evidence both as rebuttal and as going to the plaintiff's state of mind.

A number of other assignments of error are argued by appellants, but we do not deem it necessary to go further than to consider certain instructions requested by appellants and refused by the court.

[33-36] The important issues tendered by the answer were fraud, undue influence, the weakened condition of decedent by age, and the gross inadequacy of the consideration. Appellants prepared and offered a number of instructions setting forth their several defenses which were calculated to give the jury a full understanding of the issues involved in the case and the rules of law applicable to the issues as framed by appellants. These requested instructions which had to do strictly with undue influence and inadequacy of consideration were all refused and no equivalent instructions were elsewhere given. Unless the pleadings were read to the jury—and it does not appear that they were—the jury would not have definite or sufficient information as to all of the vital matters of defense plead by appellants.

The consequent duties and obligations which the law imposes, in a case where a confidential relation is shown to exist, upon a person who greatly advantages in treating with a confiding person, are nowhere fully or adequately stated. The only instructions given at the request of appellants in which the subject "confidence" reposed in another is mentioned are instructions No. 70 and No. 75. All others were refused. The ones given in no way informed the jury as to the *effect* of such relations or the rules of law to be applied in such cases, but merely enumerated some of the things that may properly be considered in determining whether such relations exist. The only references made to the subject in the instructions given at the request of plaintiff are to be found in instructions No. 3, No. 11, No. 11 (a), No. 11 (c), No. 11 (b), and No. 13. Instruction No. 3 threw the burden unqualifiedly on appellants. No. 11 did likewise. By No. 11 (a) the jury was told that a confidential relation does not in and of itself raise any presumption of fraud or undue influence unless it is also established by a preponderance of the evidence that such confidential relation was actually used to obtain an unfair advantage. By instruction No. 11 (b) the jury was told that the proof of undue influence must be substantial to the effect that pressure was used which overpowered the volition of the party upon whom it operated, and that it must amount to more than a suspicion. No. 13 merely mentioned "undue influence" in a negative way and did not purport to throw any light on the law applicable to confidential relations. This covers every reference made to the subject of confidential relations, and no sufficient instruction was given on the subject of gross inadequacy of consideration. These two major defenses, therefore, were not adequately called to the consideration of the jury. The defendants stressed both issues by a number of instructions which were rejected. By instructions No. 3 and No. 11, given at plaintiff's request, the jury was told that the burden of proving undue influence by a preponderance was upon the defendants. The general rule is that the burden is on the party who introduces affirmative matter. The instructions, however, made no exception as to the burden shifting to the trustee to show that the transaction was fair, free from fraud or undue influence, if a confidential relation is shown to exist and the transaction as to the confiding party was inequitable and the consideration was grossly inadequate. It is conceded that plaintiff wrote the entire instrument, except the signature, which she seeks by her action to enforce. The line of authorities is unbroken to the effect that where a confidential relation exists and one of the parties to the relationship has shown great activity in procuring the execution of the instrument by which he or she greatly benefits by the transaction, the activity of such person becomes an important factor for the court or jury to consider in determining whether the transaction was free from undue influence. If such relations are found to exist the burden of showing that no undue advantage was taken shifts to the other side. Estate of Lances, 216 Cal. 397, 14 P.(2d) 768; Estate of Yale, 214 Cal. 115, 4 P.(2d) 153; Estate of Nutt, 181 Cal. 522, 185 P. 393. Several instructions containing these propositions of law were asked but all were rejected.

[37, 38] Appellants set out in their briefs some fifty requested instructions, a number of which they vigorously urge should have been given and it constituted reversible error to refuse them. Among this number, which bore upon the fundamental issues of law presented by the defense, and which appellants specially urge, are Nos. 40, 69, 71, 72, 73, and 74. Space will not permit a reproduction of all of the rejected instructions and we will set forth but two as typical, in a general way, of the others. Instruction No. 40 reads: "The plaintiff's action in this case is based upon the documents herein sued upon. The defendants have pleaded, among other defenses, that the consideration for this document, if any, was grossly inadequate. Defendants also claim, as one of their defenses, that the said document was fraudulently obtained by the plaintiff from Colonel J. B. Lankershim. I instruct you that it is the law that a presumption of fraud arises where there is a great disparity between the value of services rendered and the recompense, and a confidential relation exists between the parties, and the party promising to pay has had no independent advice and has relied upon the beneficiary named in the preparing of the document signed by him, and the beneficiary under the document writes the entire body of the document in her own hand. It is for you to determine from the evidence if the different factors set out existed at the time it is alleged the document herein sued upon was made (if you find it to have been made)."

None of the instructions gave consideration to independent advice as an issue in cases in which confidential relations are alleged, nor on the important matters mentioned herein. The instruction would have been freer of criticism had it read: "A presumption of undue influence" rather than a "presumption of fraud." In the interest of a full and complete understanding of the law applicable to the case it was necessary that the jury be instructed on the major subjects raised by the pleadings even if a modification in this or other respects was required to make a more acceptable presentation of the law. We think this is the rule approved by statute and judicial decision where fundamentals are involved, there being no attempt on the part of the author to mislead the court or jury by resorting to equivocally or ingeniously phrased requests, especially in cases where the jury otherwise would be left uninstructed on vital issues of the case.

Instruction No. 72 is more comprehensive and reads: "The law defines a confidential relation as any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. A fiduciary relation in law is ordinarily synonymous with a confidential relation. It is also founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed. If, therefore, from all the evidence in this case, you find that the relations between Colonel J. B. Lankershim and the plaintiff were such that Colonel Lankershim reposed confidence in the integrity or fidelity of plaintiff, and relied upon plaintiff in the transaction involved, and that plaintiff voluntarily accepted or assumed to accept such confidence, then you must find that a confidential relation existed between Colonel J. B. Lankershim and plaintiff. Where such a confidential relation exists, the law views with strictness the business dealings of the one in whom the confidence is reposed to show that the other party to the relation acted voluntarily with a full knowledge of all the facts and that the transaction was fair and just. If, therefore, you find from all the facts of this case that a confidential relation did in fact exist between Colonel J. B. Lankershim and the plaintiff at the time of the execution and delivery of the document here sued upon (if it was executed and delivered) the burden is upon plaintiff of showing that the transaction was fair and just and fully understood and consented to by Colonel J. B. Lankershim, and unless you find that plaintiff has shown the transaction to have been of this character, your verdict must be for the defendants."

The above proffered instruction, as well as several others, seems to be a sound exposition of the law on the subjects of which they treat and such instructions were essential for the jury's guidance as to the effect and sufficiency of the evidence. The jury should have been given full instructions as to the principle which several of them enumerated. Further, they should have been given in view of certain instructions given at the request of plaintiff, which have already received attention. The importance of the jury being fully instructed as to the inadequacy of consideration in a case of this nature is made pertinent by the following excerpt from Odell v. Moss, 130 Cal. 352, 358, 62 P. 555, 557, supported by ample authority: "There was no consideration, or at least no adequate consideration, for the deeds and from this alone the presumption of undue influence arises. The case is one of that class of bargains that are said to be 'of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition, or undue influence; * * * such bargains as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, being inequitable and unconscionable bargains.' 1 Story's Eq. Jur., § 244, et seq." Allore v. Jewell, 94 U. S. 506, 24 L.Ed. 260; Hume v. U. S., 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393; Bassick v. Aetna Explosives Co. (D.C.) 246 F. 974.

[39] Respondent takes the position that the judgment may be sustained on the theory of novation or account stated. Neither theory was presented by pleading, or raised during the trial by evidence directed to the issues, or by any request for instructions framed to elucidate said theories. This precludes respondent from arguing these new theories on appeal.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.

EDMONDS, J., being disqualified, did not participate in the consideration or decision of this case.

9 Cal.2d 495

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. HILL et al.

CARTER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Sac. 5061.

Supreme Court of California.

Aug. 24, 1937.

Rehearing Denied Sept. 23, 1937.

1. Trial 🔑395(1)

Finding that named defendants at a certain time and place unlawfully took and carried away goods of the plaintiff and converted them to their own use to plaintiff's damage in a certain sum was sufficient to support either an action in assumpsit for value of personalty converted or an action in tort for wrongful conversion of personalty.

2. Action 🔑28

Where personalty is wrongfully converted, the owner may sue ex delicto for the wrong, or he may waive the tort and sue in assumpsit for value of property converted.

3. Attachment 🔑184
Mortgages 🔑151(4)

That judgment, in action in which plaintiff pleaded a cause of action for conversion of personalty and for goods sold and delivered, was for recovery of damages, did not render judgment one based upon cause of action in tort, and hence did not discharge attachment lien in such action so as to give priority to mortgage executed by defendant after levy of attachment, and before execution thereunder.

4. Election of remedies 🔑5

A party aggrieved by the unlawful conversion of personalty cannot recover both on cause of action for the tort, and cause of action based on contract, but must elect his remedy and stand upon his election.

5. Election of remedies 🔑4

The right of election is intended for the benefit of the party charged and may be waived by him.

6. Judgment 🔑18(4)

The failure to require a party to an action to exercise his right of election is at most a mere irregularity and would render judgment voidable only.

7. Judgment 🔑504, 518

Proceeding to foreclose a mortgage executed after realty had been attached but before it was sold under execution was a "collateral attack" on judgment rendered in attachment suit, and hence an irregularity in the proceedings leading up to the judgment in attachment suit, due to failure of plaintiff in such suit to make his election between his cause of action in tort and in contract, could not be relied upon to defeat judgment.

[Ed. Note.—For other definitions of "Collateral Attack," see Words & Phrases.]

8. Attachment 🔑183

Where only judgment in action in which a cause of action in tort and in contract were pleaded was for plaintiff, effect of judgment was to continue the attachment lien notwithstanding judgment might have been rendered either upon the tort or contract cause of action (Code Civ.Proc. § 553, as amended by St.1933, p. 1866).

9. Appeal and error 🔑520(1)

The order of the trial court is no part of the judgment roll and cannot be considered even on appeal.

10. Judgment 🔑527

Where judgment in attachment suit could be construed as being based upon cause of action in assumpsit, the prior opinion or statement of the trial court could not be resorted to for purpose of defeating the subsequent and final determination of the trial court as shown by its judgment.

11. Execution 🔑268

Sale of attached property under execution issued on judgment in action in which attachment was issued wiped out lien of trust deed executed subsequent to levy of attachment, and hence purchaser at execution sale took title to property free from lien of trust deed.

12. Judgment 🔑524

A judgment which was ambiguous in certain respects due to some oversight or inadvertence either on part of court or counsel in drawing the judgment was to be liberally construed with a view to giving effect to real intention of parties.

In Bank.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by the Bank of America National Trust & Savings Association against Theo. K. Hill, Jesse W. Carter, and others to foreclose a mortgage and for the appointment of a receiver of the property, wherein Jesse W. Carter filed an answer and cross-complaint seeking to have his title to the realty quieted as to the claims of the plaintiff. From a judgment for Jesse W. Carter quieting his title to the realty, the plaintiff appeals.

Affirmed.

James A. Pardee, of Susanville, Chenoweth & Leininger, of Redding, and Louis Ferrari, of San Francisco, for appellant.

Carter & Barrett and Carter, Barrett, Finley & Carlton, all of Redding, for respondents.

CURTIS, Justice.

On August 29, 1931, defendant F. A. Landon commenced an action in the superior court of the county of Shasta against defendants Theo. K. Hill and George Exley. The complaint in said action set forth three causes of action. The first cause of action was for damages for eviction from certain real property. The second cause of action was for conversion of personal property to plaintiff's damage in the sum of $528. The third cause of action was to recover an indebtedness of $528 for goods, wares and merchandise sold and delivered. It is admitted that the second and third causes of action were based upon the same transaction. In that action a writ of attachment was regularly issued and placed in the hands of the sheriff of said county, who duly levied the same upon the real property here involved. On December 30, 1931, and while said action was pending, Hill executed and delivered to the predecessor of plaintiff a trust deed on said property to secure the payment of $1,500, which trust deed was duly recorded on January 7, 1932. On April 29, 1932, judgment in said action was rendered in favor of Landon and against Hill for $4,500 damages in the first cause of action, and "that plaintiff recover damages from defendants, Theo. K. Hill and George Exley, in the sum of $174.00." Execution was taken out and levied upon said real property and the same was sold to defendants, Jesse W. Carter and F. A. Landon, and on November 1, 1934, the purchasers received a sheriff's deed to said real property. On August 13, 1934, this action was brought to foreclose said trust deed and for a receiver of the property in controversy. Jesse W. Carter, having acquired the interest of defendant Landon in said real property, filed an answer and also a cross-complaint praying that his title to said real property be quieted as to the claims of the plaintiff, the Bank of America National Trust & Savings Association. Upon these issues the case was tried by the court, and resulted in a judgment in favor of the defendant and cross-complainant quieting his title to the real property involved. The plaintiff, the Bank of America National Trust and Savings Association, has appealed.

It is the contention of the appellant that the judgment rendered in the action of Landon v. Hill was for the recovery of damages only in an action in tort, and that the attachment theretofore issued and levied upon the real property was extinguished or discharged by said judgment.

It is conceded that the attachment was properly issued under the third cause of action of the complaint in the action of Landon v. Hill and that it was legally levied upon said real property, but it is contended that the judgment for the recovery of damages for the conversion of the personal property was rendered upon the second cause of action and not upon the third cause of action, and therefore that said judgment did not continue in force the attachment lien, but that the attachment was extinguished or discharged by said judgment.

[1] The trial court in the action of Landon v. Hill found: "That it is true that on or about the said 24th day of August, 1931, in said town of Anderson, county of Shasta, state of California, the above named defendants, Theodore K. Hill and George Exley, unlawfully took and carried away said goods, wares and merchandise, and converted and disposed of the same to their own use, to the damage of plaintiff in the sum of $174.00." The facts found by the court support either the second cause of action in tort for the wrongful conversion of the personal property, or the third cause of action in assumpsit for the value of the personal property wrongfully converted. There is no doubt in our opinion that this finding is sufficient to support an action in assumpsit. Los Angeles Drug Co. v. Superior Court (Cal.Sup.) 63 P.(2d) 1124. We have, therefore, a proper complaint in an action upon a contract and a finding of the court that the allegations of the complaint are true. We now pass to the consideration of the judgment rendered in the same action. As we have seen, in the judgment it was adjudged and decreed "that plaintiff recover

damages from defendants Theo. K. Hill and George Exley in the sum of $174.00." It is contended by appellant that as the judgment was rendered for the recovery of "damages," it must necessarily be held that the judgment was based upon the second cause of action which was a cause of action in tort.

[2] Where personal property is wrongfully converted, the owner thereof may sue ex delicto for the wrong, or he may waive the wrong and sue either for the value of the property converted or for money had and received. Hallidie v. Enginger, 175 Cal. 505, 508, 166 P. 1. "According to the well established principles of law, where a wrongful act is both a tort and a breach of contract, the plaintiff may waive the tort and sue in contract. By virtue of this rule it is well settled that where a person takes and sells the property of another, without authority, the party aggrieved may waive the tort and sue in assumpsit for the price received at such sale or for the value of the property so taken. The basis of this 'waiver of tort' is that the plaintiff consents to the taking of his property and affirms the act of the wrongdoer. He treats it as a sale, and recovers the value due him under an implied contract of sale." 1 Cal.Jur. p. 322.

The rule thus announced was followed by this court in its recent decision in the case of Los Angeles Drug Co. v. Superior Court (Cal.Sup.) 63 P.(2d) 1124, 1125. That action involved the power of the court to dissolve an attachment issued in an action for the recovery of the value of goods wrongfully converted. It was held that the complaint in said action was framed upon the theory of an implied contract and therefore the attachment was regularly issued and the court was without the power to dissolve the same. This court in that action quoted with approval the following statement of law: "While the complaint does allege that the property was 'converted' by defendants, we think that the action was in reality one in assumpsit for the value of the property sold." Corey v. Struve, 170 Cal. 170, 172, 149 P. 48.

From these authorities it will be seen that where personal property is wrongfully converted, the owner may waive the tort and sue in assumpsit for the value of the property wrongfully converted. The action of assumpsit is defined as "an action for the recovery of damages for the nonperformance of an oral or simple written contract." 5 Cor Jur. p. 1380. In 2 Ruling Case Law, p. 742, we find the following definition: "The action of assumpsit is a remedy by which compensation in damages may be recovered for the nonperformance of a contract."

[3] The contention of appellant, therefore, that as the judgment in the case of Landon v. Hill was for the recovery of damages, it was rendered in an action in tort, or in the second cause of action, cannot be sustained. On the other hand, that part of the judgment which provided that plaintiff was entitled to recover damages in the sum of $174 against the defendants conformed in all respects to a judgment based upon a cause of action in assumpsit for the recovery of the value of personal property wrongfully converted.

[4-7] Appellant further contends that this judgment also is a valid judgment in the action in tort as set forth in the second cause of action in the case of Landon v. Hill, and that while an aggrieved party may, where property belonging to him has been unlawfully converted by another, waive the tort and sue on contract, he cannot do both, and recover on both causes of action. The authorities upon this question are that the aggrieved party cannot recover two judgments for the one wrong, and that he must elect his remedy and stand upon his election. Hallidie v. Enginger, supra. But in the action of Landon v. Hill only one judgment was recovered for the conversion of said personal property. The right of election is intended for the benefit of the party charged, and may be waived by him. Klinger v. Modesto Fruit Co., Inc., 107 Cal.App. 97, 103, 290 P. 127. At most, the failure to require a party in an action to exercise this right is a mere irregularity and would render the judgment in the action voidable and not void. In a collateral attack on the judgment, and the present proceeding is such an attack, an irregularity in the proceedings leading up to the judgment may not be relied upon to set aside or defeat a voidable judgment. 15 Cal.Jur. 83.

[8] As we have seen, the attachment was regularly levied and became a valid lien upon the real property attached. Such lien remained in full force up to the time judgment was rendered. Had the defendant in said action recovered judgment, the attachment would have been discharged and the attached property released from said attachment. Section 553, Code Civ.Proc., as amended by St.1933 p. 1866. In that ac-

tion, however, the defendant failed to recover any judgment whatever. The most that can be said in favor of the claim of the appellant herein is that the judgment is not free from uncertainty and may be considered as a judgment either upon the second or the third cause of action. Had it been rendered only upon the second cause of action, the defendant therein would have been entitled to his costs incurred in the third cause of action in which the attachment issued. But no such judgment was rendered. The only judgment rendered, as we have seen, was in favor of the plaintiff in said action, the effect of which was to continue the attachment lien, not to discharge the same.

[9, 10] The appellant suggests that the order of the court made at the conclusion of the trial in the case of Landon v. Hill, in which the court directed that judgment be given in favor of the plaintiff on the first and second cause of action and instructed plaintiff's counsel to draw findings indicates that the trial court intended that its judgment for the conversion of the personal property involved was based upon the second rather than the third cause of action. This order of court is no part of the judgment roll, and like the opinion of the trial court in the decision of a cause cannot be considered even on appeal. Estate of Felton, 176 Cal. 663, 169 P. 392; 2 Cal.Jur. p. 488. It was not admissible for any purpose in this proceeding which is a collateral attack on the judgment. The findings were drawn and signed by the court, and as we have seen they support either a judgment on the second or on the third cause of action. The conclusions of law and the judgment follow the findings. There is no finding against the plaintiff upon his third cause of action, and, as we have seen, there is no judgment against plaintiff on the third cause of action. As this judgment which was signed by the trial judge may be construed as one based upon the third cause of action, the prior opinion or statement of the trial court may not be resorted to for the purpose of defeating the subsequent and final determination of the court as shown by its judgment.

[11] As the attachment lien was prior in time to the trust deed of the plaintiff, the subsequent sale of the attached property under an execution issued on the judgment in the action in which the attachment was issued, wiped out the lien of the trust deed, and the purchasers at such sale took title to the property purchased free from the lien of the trust deed.

[12] The equities in the case are entirely with the respondent. His predecessor had a good cause of action entitling him to a writ of attachment. The attachment was duly issued and regularly levied. The findings of the court support the allegations of the third, or ex contractu cause of action. Respondent's predecessor was therefore entitled to a judgment upon his third cause of action. If such a judgment was ambiguous in certain respects, the ambiguity was due to some oversight or inadvertence either on the part of the court or counsel in drawing the judgment. For this reason the judgment as rendered should be liberally construed with a view to the giving effect to the real intention of the parties. On the other hand, the record shows that at the time the trust deed was given in favor of the bank, the attachment was a valid lien upon the real property covered by the trust deed. The bank had constructive, if not actual, notice of the attachment proceedings, as it would be most unusual for a bank to loan money upon real property without having a search of title made. The judgment rendered in the attachment proceedings was for a comparatively small amount, and the bank could have satisfied the same by a payment or tender of this amount. It made no such attempt, but allowed the attached property to be sold under execution. No redemption from said sale was made during the year immediately following the sale. The sheriff accordingly executed and delivered a deed of the property to the purchasers. The bank had every opportunity to protect itself from the attachment and also from the judgment subsequently rendered. It failed to avail itself of any of these opportunities but chose to rely upon its chances of defeating the attachment lien and thereby acquire a first lien upon the attached property. In this endeavor, in our opinion, it signally failed.

The judgment is affirmed.

We concur: EDMONDS, J.; SHENK, J.; SEAWELL, J.; NOURSE, Justice pro tem.

9 Cal.2d 485

MORRIS v. POUNDSTONE et al.

Sac. 5114.

Supreme Court of California.

Aug. 24, 1937.

Rehearing Denied Sept. 23, 1937.

1. Drains ⇨88

Levees and flood control ⇨28

Under statutes governing sale of delinquent lands acquired by reclamation district, sale by county treasurer, as trustee, of part of entire assessment tract purchased by him before ascertainment of amount of reapportionment was invalid and reapportionment predicated thereon was void, since resale of part of tract was not permitted by statute and reapportionment was required before sale (Pol.Code, § 3466a, as amended by St.1935, p. 2094, and § 3480, as amended by St.1931, p. 762).

2. Constitutional law ⇨143

Statute governing sale of delinquent lands acquired by reclamation district, if interpreted as permitting sale before reapportionment, would unconstitutionally impair contract rights of holders of bonds which were issued before statute was passed (Pol.Code, § 3466a, as amended by St. 1935, p. 2094, and § 3480, as amended by St. 1931, p. 762).

3. Drains ⇨82(5)

Levees and flood control ⇨25

Reclamation district bondholder was "person interested" within statute conferring on person interested right to object to any assessment or reapportionment of such assessment (Pol.Code, § 3462).

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

4. Drains ⇨82(5)

Levees and flood control ⇨25

An action to annul reapportionment of assessment by trustees of reclamation district, as provided by statute, was proper, as against contention that certiorari was sole remedy, where invalidity of sale rendered subsequent reapportionment at request of purchasers totally void, since validity of sale was jurisdictional prerequisite to reapportionment and lack of jurisdiction may be attacked by action (Pol.Code, § 3462).

In Bank.

Appeal from Superior Court, Colusa County; Arthur C. Coats, Judge.

Action by Mary E. Morris against Marion Poundstone and others, as trustees of Reclamation District No. 108, and California Gibson, as county treasurer of Colusa county. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

Thomas Rutledge, of Colusa, A. C. Huston, of Woodland, Horace B. Wulff, of Sacramento, and Huston, Huston & Huston, of Woodland, for appellants.

Clark, Nichols & Eltse, of Berkeley, for respondent.

SEAWELL, Justice.

Defendants appeal from a judgment of the superior court of Colusa county annulling a reapportionment by the board of supervisors of that county of assessment No. 5 of Reclamation District No. 108, in so far as that assessment, as originally levied, affected tract No. 109. Tract 109 contains 3,120 acres. In 1923 it was duly and properly assessed for assessment No. 5 for $197,538.63. In 1925 bonds in the sum of over $3,000,000 were issued upon assessment No. 5. Plaintiff is the holder and owner of some of these bonds, so secured.

The facts giving rise to the present controversy are as follows:

In June of 1931, the county treasurer of Colusa county, as trustee of the bond fund of Reclamation District 108, acquired the title to tract 109, containing 3,120 acres, for the nonpayment by the owner of the call of April 1, 1930, of assessment No. 5. In 1936 the county treasurer purported to purchase the title of the state to three small parcels of land designated as tracts A, B, and C, all included within the exterior boundaries of tract No. 109. The total acreage of these three tracts was about 280 acres. These three tracts were located approximately in the middle of tract 109. Thereafter, on April 18, 1936, the county treasurer, purporting to act under the provisions of section 3466a of the Political Code, as amended by St.1935, p. 2094, offered for sale at public auction, the tax title of the state and the tax title of the district, to tracts A, B, and C. Prior to this sale the board of trustees of the district, purporting to act under section 3466a of the Political Code, purported to fix and determine the full market value of parcels A, B, and C as an entirety at the sum of $10,399.42. At the sale so held, defendants Marion Poundstone, George Poundstone, and Rose P. Keller purchased the three parcels as a unit at the price fixed by the board of trustees, no other bids being made. Thereafter the county treasurer issued to the purchasers two deeds, one purporting to convey the state title held by her, and the other purporting to convey the title held by her as trustee, acquired through the delinquent sale for assessment No. 5. Under section 3466a of the Political Code, these deeds were subject to the uncalled balance of assessment No. 5. Thereafter the three purchasers petitioned the board of trustees, under section 3460 of the Political Code, to reapportion the uncalled portion of assessment 5 on tracts A, B, and C. The board of trustees reapportioned the uncalled portion of the assessment, and prepared a list of the portion assessed against tracts A, B, and C. This list was filed with the board of supervisors, as required by section 3462 of the Political Code. After notice of hearing of objections had been given, as required by that section, plaintiff appeared and objected, stating as one ground of objection that the board had no jurisdiction to proceed. The board of supervisors overruled the protest of plaintiff and approved the reapportionment. Plaintiff, within the 30 days required by section 3462 of the Political Code, commenced the present action to annul the reapportionment in the manner provided in that section.

[1] As already indicated, the trial court annulled the reapportionment. The exact theory of the trial court cannot be ascertained, findings having been waived, but apparently the trial court was of the opinion that, after the treasurer, as trustee, has purchased a tract of land for a delinquent assessment, neither section 3466a nor any other section of the Political Code permits the treasurer to resell that land in smaller tracts in the manner disclosed by the record herein. The correctness of the trial court's determination depends primarily upon the proper interpretation of section 3466a of the Political Code, that section having been added to the code in 1931. The problem can be stated as follows: Admitting, without deciding, that section 3466a, having been added to the code of 1931, can be validly applied to a sale held in 1936, although the bonds were issued in 1925, does that section, properly interpreted, permit the treasurer, after he has purchased as trustee an assessment tract for delinquent assessments, to resell a part of that assessment tract before any reapportionment of the balance of the assessment has been had, or is the treasurer required to resell the assessment tract so purchased as a unit? We are of the opinion that section 3466a does not permit the resale of part of an assessment tract in the manner adopted by the defendant county treasurer in the present case.

At the time the bonds held by plaintiff were issued (1925), section 3480 of the Political Code governed the powers of the county treasurer in reference to the resale of lands purchased for delinquent assessments. As the section then read (St.1923, p. 598), it is conceded by all the parties to this appeal that the county treasurer was required to resell any assessment tract purchased for delinquent assessments as a unit. This concession is clearly sustained by the provisions of the section as it then read. The section provided that after the treasurer had purchased the land at a sale for delinquent assessments, which he was required to do if no purchaser appeared, and after the one year period of redemption had elapsed, he might resell in the following manner and on the following conditions: "*Any parcel* of land bid in and purchased by a treasurer as aforesaid, as trustee of the bond fund of the district, may be sold and conveyed by him * * * at any time after the expiration of said redemption period of one year, at public or private sale and with or without notice to any person paying him the amount for which *said parcel* was bid in by said treasurer at delinquent sale, with interest thereon at the rate of seven per cent per annum, compounded yearly, from the date of said delinquent sale, and also the amount of all subsequent installments then delinquent, with accrued interest and penalties thereon. * * * The treasurer shall execute a deed to such purchaser upon such sale, conveying said property free of encumbrance except state, county and municipal taxes, and the unpaid balance of said assessment." It is quite clear that under this section the authority of the treasurer to sell was limited to the *parcel* purchased by him at delinquent sale, and he was required to secure a price equal to the full amount that he had paid for the property, plus interest and penalties. Obviously, there was no authority and no means provided for the sale of part of a tract.

Section 3480 of the Political Code fixed a definite price, as above indicated, at which the property had to be sold. With the recession of real estate values caused by the late depression, it frequently happened that the price fixed by section 3480 exceeded the fair market value of the property, with the result that county treasurers were unable to sell lands purchased by them for delinquent assessments of reclamation districts. With this in mind, the Legislature amended section 3480 in 1931 (St.1931, p. 762) to provide in part that "after the lapse of one year from and after the expiration of the period of redemption, *such parcel* may be sold as in section 3466a of this code provided." Note that the amendment refers to the sale of "the parcel" of land already purchased at delinquent assessment sale by the treasurer. As part of the same reform, section 3466a was added to the Political Code. It provides in part: "After the lapse of one year from and after the expiration of the period of redemption of *any land* sold in the district, * * * either pursuant to the provisions of sections 3466, 3480 or section 3480a of this code, the county treasurer of the main county, * * * may in their discretion then *sell any land remaining unsold,* to the highest bidder for cash." The section then provides for the place of sale and the giving of notice thereof, and in connection with the notice provides: "It shall be sufficient to describe said land in said notice by reference number as set forth in the assessment lists." As to the price at which the land is to be sold, it is provided that: "The trustees of the district shall have the right to reject any and all bids and no bid shall be accepted for an amount less than such price as shall be approved by them. No parcel shall be sold for an amount less than the fair market value thereof as such value shall be ascertained by the board of trustees. * * * Upon such last mentioned sale being made as herein provided, the said county treasurer shall execute a deed to the purchaser conveying the land sold, upon payment of the price bid, which deed shall have the effect of conveying title to the land sold to the purchaser free of encumbrance, except district assessments (including the unpaid balance of said assessment for the delinquency of which said property was sold) which upon the date of the sale herein provided had not been called."

Appellants contend that this section completely changed the method of sale by county treasurers of reclamation land purchased at delinquent tax sale; that, although section 3480 of the Political Code prohibited such resale except of the entire parcel purchased at the delinquent sale, under section 3466a of the Political Code, the treasurer was authorized to sell in parcels smaller than the parcels so purchased. This contention is predicated almost entirely on the words italicized in the above quotation, authorizing the treasurer to *"sell any land remaining unsold."* It is contended that these words authorize the treasurer or board of trustees to break up a tract purchased for delinquent assessments and to sell portions or a portion of it without selling the entire tract. Appellants point out the difference in phraseology between sections 3480 and 3466a. Whatever merit there might be in appellants' interpretation of these words standing alone (and we think there is none) is completely dissipated when the section is read as a whole.

It is obvious from a reading of section 3466a that the main purpose of the Legislature in passing the section was to permit reclamation districts holding lands purchased as a result of delinquent assessment sales, to resell the same for the fair market value, in place of the requirement in section 3480 that such lands had to be resold for the amount of the delinquency, plus interest and penalties. The validity of this change in the selling price was upheld in Rivers Farm Co. v. Gibson, 4 Cal.App.(2d) 731, 42 P.(2d) 95, it being held in that case that such a change did not unlawfully impair the contract rights of the bondholders. The same case also held that another 1931 statute giving the former owner of the land a preferential price at which he could purchase was unconstitutional, because it unlawfully impaired the contract rights of the bondholders. There is nothing in the new section to indicate that the Legislature had in mind authorizing the breaking up of assessment tracts so purchased, and reselling them piecemeal, in fact, the section clearly indicates that no such change was contemplated. It will be noted that section 3466a of the Political Code, after providing for the notice of sale, provides, "It shall be sufficient to describe said land in said notice by reference number as set forth in the assessment lists." In the present case the tract purchased at delinquent assessment sale was listed as tract 109, containing 3,120 acres. The notice of sale given as required by section 3466a did not, nor could it, refer to tract 109, but it referred to parcels A, B, and C, giving a metes and bounds description, these three tracts including about 280 acres.

Clearly the Legislature, by permitting reference to the tract number, contemplated that the tract would be sold as a unit; otherwise, the permission granted is meaningless.

[2] There is another and more important reason why the procedure adopted by the board of trustees in the instant case cannot be sanctioned. Section 3466a provides, as did section 3480, that the purchaser at such sale takes the land subject to the "unpaid balance of said assessment for the delinquency of which said property was sold, which upon the date of the sale herein provided had not been called." The section also requires a sale at the fair market value to the highest bidder. Now, let us see what the board of trustees did and could do under appellants' construction of the section. Tract 109 included 3,120 acres and was assessed for over $197,000. Various calls were made on this assessment. The entire tract was purchased by the county treasurer, as trustee, for failure to pay a delinquent assessment. The board of trustees then determined to sell three small parcels out of the heart of that tract, totaling about 280 acres. The evidence shows that these 280 acres constitute some of the best land in the tract. Admittedly the quality and value of the lands within tract 109 are not uniform. Aside from the difficulty of apportioning the amount of delinquency properly chargeable to the 280 acres, there is another difficulty. A prospective purchaser knows that he must take the land subject to a proportional part of the uncalled portion of the $197,000 assessment levied on the entire tract. Nothing is done by the board of trustees to ascertain the amount of such reapportionment prior to the sale. Until the reapportionment is had, it is impossible for a prospective purchaser to know what even the approximate amount of the reapportionment of the parcels offered for sale will be. How can a prospective purchaser intelligently bid at such a sale? Is such a sale an open and fair sale? In the instant case, the children of the former owner of tract 109, the former owner being the manager of the reclamation district, were the sole bidders. Perhaps they had some advance information as to how the board of trustees intended to reapportion the assessment, but purchasers generally could not possibly have such knowledge. If, as appellants claim the section should be interpreted as permitting such a sale, having been passed after the bonds were issued, in our opinion, the statute would unconstitutionally impair the contract rights of the bondholders. This necessarily follows, because it would be attempting to substitute for the type of sale provided for in section 3480 of the Political Code at the time the bonds were issued, a type of sale where the bidding would be limited to those who either had advance information as to the amount of the reapportionment, or were willing to gamble as to the amount thereof. Such a material cutting down of the rights of the bondholders could not be accomplished lawfully, under the theory and authorities fully discussed in Rivers Farm Co. v. Gibson, supra. It is true that section 3460 of the Political Code permits a reapportionment of the assessment under some circumstances. We do not need to decide now, the point not being involved, whether the board of trustees and the county treasurer, after a purchase of a tract for a delinquent assessment, but before a resale, such as is provided for by section 3466a, could subdivide the tract and secure a reapportionment. Here the reapportionment was not sought until after the sale. For the reasons already stated, such sale must be held to have been invalid, which necessarily determines that the reapportionment, predicated thereon, was likewise void and was properly annulled.

[3] Appellants likewise contend that respondent bondholder had no right to maintain this action. We do not find it necessary here to discuss the nature of a bondholder's rights, nor the nature of his interest in lands included within a reclamation district and sold to the treasurer as trustee for the bond fund, by reason of delinquent assessments. That problem has been discussed many times by the appellate courts of this state. In Rivers Farm Co. v. Gibson, supra, the cases are collected and commented upon. Clearly the bondholder is a "person interested" within the meaning of section 3462 of the Political Code, which section confers on a person interested the right to object to any assessment or reapportionment of such assessment.

[4] The remedy pursued by respondent herein is specifically provided for by section 3462 of the Political Code, and respondent followed exactly the procedure therein outlined. The contention that certiorari was the sole remedy of respondent to review the action of the board is without merit.

As already held, the invalidity of the sale rendered the subsequent reapportionment at the request of the purchasers at that sale totally void. In the present case the validity of the sale was a jurisdictional prerequisite to the reapportionment. Lack of jurisdiction in the board to act at all clearly may be attacked by action. Section 3462 of the Political Code, so providing, is clearly valid.

In view of the construction herein given to section 3466a of the Political Code, the many other points discussed in the briefs need not be passed upon.

The judgment appealed from is affirmed.

We concur: LANGDON, J.; EDMONDS, J.; CURTIS, J.; NOURSE, Justice pro tem.

9 Cal.2d 521

COFFIN v. ODD FELLOW HALL ASS'N OF MODESTO.

Sac. 5077.

Supreme Court of California.

Aug. 27, 1937.

As Modified on Denial of Rehearing Sept. 23, 1937.

1. Quieting title 🔑10(1)

In an action to quiet title, plaintiff may only prevail upon the strength of his own title.

2. Quieting title 🔑10(2)

In an action to quiet title where both parties do not claim through a common grantor, a plaintiff who relies upon a paper or record title must trace it either to the government or to a predecessor shown to have been in possession at time of conveyance made by him.

3. Quieting title 🔑44(4)

In action to quiet title to disputed four-foot strip of land, where plaintiff and defendant both claimed under different grantors and evidence affirmatively showed some title in other than plaintiff's grantor with no explanation of how plaintiff's grantor had succeeded to it and failed to show that such grantor had ever been in possession of property, plaintiff was not entitled to judgment quieting title.

4. Easements 🔑61(3)

Grantor, who failed to establish title in herself to land described in deed at time it was executed, was not entitled to an adjudication entitling her to use of hallway which was reserved in such deed.

5. Easements 🔑61(8)

Plaintiff was not entitled to a finding that she had an easement over one-foot portion of stairway lying on land lying entirely outside of the land described in the pleadings and entirely outside the issues raised thereby.

In Bank.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Emma Coffin against the Odd Fellow Hall Association of Modesto. Judgment for plaintiff, and defendant appeals.

Reversed.

Dennett & Zion and L. L. Dennett, all of Modesto, for appellant.

Cleary & Zeff and Leslie A. Cleary, all of Modesto, for respondent.

EDMONDS, Justice.

This litigation arose over the conflicting claims of the parties to the use of a stairway in a commercial building and to a strip of land upon which a portion of the building stands. The trial court rendered a judgment in favor of plaintiff, which in addition to quieting her title to the land, gave her other relief in connection therewith, including a share of certain amounts found to have been collected by the defendant as rental. The appeal is prosecuted from this judgment.

It is alleged in the complaint that on and prior to December 1, 1900, William Coffin and James Berry each owned an undivided one-half interest in the real property described as the 49½ feet of the west end of three lots situated in the city of Modesto; that on said date William Coffin conveyed his interest in the property to the respondent; that on January 7, 1903, and prior thereto Susan Berry was the owner of an undivided one-half interest in the same property as the successor of James Berry; that on January 7, 1903, the respondent conveyed to Susan Berry a certain portion of the land having a street frontage of 22½ feet and a depth of 75 feet, "reserving the right of way to pass over the hall leading to and from the stairway and toilet on the second floor," and Susan Berry conveyed to respondent a portion of the property having a street frontage of 23 feet and the same depth, with the reservation of the same right in this hall; and that subsequently the interest of Susan Berry "in all of said property" was conveyed to the appellant.

The property alleged to have been originally owned by William Coffin and James Berry fronts on H street and has a depth of 75 feet. The portion conveyed to respondent by Susan Berry is the westerly 23 feet of the property. The 22½ feet adjoining on the east is the land conveyed by respondent to Susan Berry and to which the appellant has succeeded. Next to the east is a four-foot strip, which with the portions now owned by the appellant and respondent comprise the original 49½-foot parcel. The principal controversy between the parties concerns the title to this small piece of land.

The complaint alleges that in 1884 a two-story brick building was erected upon the 49½-foot parcel and other land adjoining it on the east; that in the portion of the building standing upon the land in dispute there is a stairway leading to the second floor; that as the building was originally constructed a hall led from the top of this stairway to a room having plumbing fixtures and also to that portion of the building situated on the land conveyed to respondent by deed from Susan Berry. By further allegations it is charged that the appellant has deprived the respondent of the use of any portion of the building upon the four-foot strip of land except the stairway and the hall extending to the portion of the building owned by her. Respondent also complains that the plumbing fixtures on the second floor were removed by the appellant. The prayer of the complaint is that the respondent "recover possession of her undivided one-half interest in the premises described" and also certain amounts as damages for her alleged exclusion from the property and other amounts as her share of the rental collected by the appellant therefrom.

By its answer the appellant denies that the four-foot piece of land was owned jointly by Susan Berry and Emma Coffin and alleges ownership and possession of the land by itself and its predecessors in interest during all times mentioned in the complaint. It also alleges that the plumbing fixtures were not used for five years prior to the commencement of the action and that they were condemned by the health authorities of the city of Modesto. A denial that it has refused respondent the right to use the stairway or the hall extending to the westerly part of the building is also pleaded.

In response to these issues the court found that from the first day of December, 1900, the date of the deed to her from William Coffin, the respondent has been the owner of an undivided one-half interest in the easterly four feet of the property. It also found that the stairway is five feet in width and that the respondent "by virtue of a prescriptive right established by more than twenty years continual use" is entitled to an easement over one foot of the stairway which stands on land owned by the appellant which adjoins the easterly boundary of the 49½-foot parcel. The findings then recite "that at all times up to the acquisition by the defendant [appellant] of the Berry interest" in the property originally comprising 49½ feet, Mrs. Berry and the respondent had used the stairway in common; that they were each the record owners of an undivided one-half interest therein; and that respondent and Mrs. Berry and her successors had also utilized in common the facilities in the plumbing room at the top of the stairway. It is then found that in 1930 the appellant without the consent of the respondent tore out the plumbing fixtures and inclosed the hall which had theretofore given access to the plumbing facilities, depriving the respondent of the use of that portion of the building, and that she has been damaged thereby in certain amounts specifically stated. There is also a finding that respondent is entitled to the use of the hallway on the second floor extending from the head of the stairway westerly.

These findings are challenged by the appellant as having no support in the evidence. In particular, the appellant contends that the respondent did not prove any title in her to the four-foot parcel of land. It also asserts that no exclusive use of the stairway was shown.

[1] Plaintiff in an action to quiet title may only prevail upon the strength of her own title. Under this rule the respondent had the burden of proving the title which she claims to own, and to establish it she offered in evidence a number of deeds and the report of a title company. The first of these deeds was made by J. B. Coldwell to William Coffin and conveys an undivided

one-half interest in and to the 49½-foot parcel of land. Another deed is from William Coffin to the respondent. It conveyed the same property with the reservation of a life estate. By this deed, the court found the respondent received the title which she asserts in this action. However, there is nothing in the record to show the source of title of J. B. Coldwell and there is no evidence that William Coffin ever was in possession of the property.

[2, 3] Where both parties to an action to quiet title do not claim through a common grantor, a plaintiff who relies upon the paper or record title must trace it either to the government or to a predecessor shown to have been in possession at the time of the conveyance made by him. San Diego Improvement Co. v. Brodie, 215 Cal. 97, 8 P.(2d) 1027; Scott v. Beck, 204 Cal. 78, 266 P. 951. The record here shows neither title deraigned from the government or any common grantor of the parties. On the contrary, the evidence offered by the respondent shows that any title to the four-foot strip of land which the appellant has acquired by conveyance came to it from the heirs of James Berry, deceased. What title James Berry had or how he acquired it does not appear, and there is no showing that Wiliam Coffin was ever in possession of the property. There is also in the evidence offered by the respondent some proof that either J. H. Hays or John C. James owned a portion of the land fronting on H street and including the disputed four-foot strip some years prior to the deed made by J. B. Coldwell to William Coffin. The record, therefore, not only fails to measure up to that required of the respondent, but affirmatively shows some title to the four-foot strip of land in others than the respondent's grantor with no explanation of how he succeeded to it, if in fact he did so.

[4, 5] The finding that the respondent is entitled to the use of the hallway on the second floor, which extends westerly across the part of the building standing upon the land conveyed to Susan Berry by her, depends entirely upon the reservation made in that deed. But the respondent has shown no title in herself to the land described in the deed at the time it was executed, consequently there is no support for the finding. Neither can the finding that respondent is entitled to an easement over the one-foot portion of the stairway which is on land lying easterly of the four-foot strip be upheld as it is entirely outside the issues made by the pleadings.

The respondent having failed to prove title, the judgment must be reversed.

It is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; NOURSE, Justice pro tem.

9 Cal.2d 534

KERN COUNTY v. WOODY, County Auditor.

S. F. 15902.

Supreme Court of California.

Sept. 1, 1937.

1. Counties 🔑153

Where county, borrowing money from state under provisions of Unemployment Relief Bond Act of 1933, failed to stipulate other means of repayment, by terms of act, loan must be repaid by deductions from gasoline tax payments (St.1933, pp. 683–685, §§ 19, 23, 24, 26).

2. Counties 🔑153

Where county borrowed money from state under provisions of Unemployment Relief Bond Act of 1933 and did not stipulate other means of payment, county auditor was justified in refusing to make payment out of general funds, since, in absence of other provision for payment, county is by act limited to payment by withholding gasoline tax funds for that purpose (St.1933, pp. 683–685, §§ 19, 23, 24, 26).

In Bank.

Petition for writ of mandate by Kern County against S. A. Woody, as county auditor of Kern County, to which respondent demurred.

Demurrer sustained, and writ denied.

Thomas Scott, Dist. Atty., and W. A. McGinn, Asst. Dist. Atty., both of Bakersfield, and Everett W. Mattoon, Co. Counsel, Los Angeles County, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for petitioner.

Borton, Petrini & Conron, of Bakersfield, for respondent.

Ray L. Chesebro, City Atty., of Los Angeles, amicus curiæ.

WASTE, Chief Justice.

Petitioner, a political subdivision of the state, seeks by this petition for a writ of mandate to obtain a favorable interpretation of the provisions of the Unemployment Relief Bond Act of 1933 (Stats.1933, p. 677), particularly those provisions of the act relating to the repayment by political subdivisions of the state of money borrowed from the state under the provisions of the act. The parties have stipulated that the issuance of an alternative writ of mandate is waived and that the matter may be submitted for decision upon the petition, the demurrer of the respondent thereto, and the points and authorities of the respective parties filed herein.

At certain dates, beginning on November 20, 1933, and ending with July 31, 1934, the County of Kern, by proceedings duly had by the board of supervisors, borrowed from the state of California, under the terms of the act above referred to, sums amounting in the aggregate to $215,000, and duly executed and delivered promissory notes therefor. In accordance with the terms and provisions of these notes, a 10 per cent. installment of principal upon each of them became due and payable on July 1, 1937. Subsequently, the county board of supervisors appropriated from the general county fund an amount sufficient to and for the purpose of repaying the installment of principal together with accrued interest. At the same time, the board of supervisors directed the respondent, auditor, to prepare and issue a warrant drawn on the treasurer of the county, payable to the state treasurer, and in an amount equal to the 10 per cent. installment of the matured principal, with interest accrued upon the total obligations to the state. The respondent refused to obey, basing his refusal upon the ground that, as the petitioner did not, nor did its board of supervisors on its behalf, at the time of applying for and of securing the loans, provide "other means of repayment," the county did not have the power or authority to repay the loans other than by deductions from the "Gas Tax," that is, the "Motor Vehicle Fuel Fund," and that moneys raised by local taxation are not legally available for such repayments. Following such refusal, the county brought this proceeding. Respondent has demurred.

[1] The refusal of the respondent to draw and issue the warrant was justified by the provisions of the Unemployment Relief Bond Act. Its terms are so clear that we deem only a brief discussion necessary. An alleged "ambiguity" between the language of sections 2 and 23 of the act, asserted by amici curiæ, fades into nothingness when all the provisions of the statute are carefully read and analyzed. Sections 23 and 26 of the act provide that loans made to the counties must be repaid by means of "deductions" from the "Gas Tax" payments to the counties, beginning in the year 1938; but a county may, at the time of applying for or securing a loan, provide other means for the payment of the same. It is admitted in petitioner's statement of facts that no "other means" was provided.

[2] Petitioner, in the instant case, alleges it has sufficient funds in its general treasury to repay the amount of the matured installments of its loans and the accrued interest, and, at present, finds urgent need for all of its allocations of gasoline taxes from the state in the repair of its roads and highways. Such contentions cannot enter into the present discussion. The particularly clear and unequivocally expressed provisions of the act allow of no other interpretation. "It is true," says the Attorney General in an opinion rendered to the attorney for this petitioner in this very matter, "that section 2 of the act provides that the loan shall constitute a debt of the borrowing county to the state, and that in the absence of any limitation, the borrowing county could repay from funds raised by a General Tax Levy. However, when we read sections 19, 23, 24 and 26 of the act along with section 2, we find that there is a definite statutory direction as to time and method of repayment and the funds to be used in such repayment." Petitioner did not provide "other means" for the repayment of the loans or any part thereof. It is therefore now limited to a discharge of the obligations by a withholding of gasoline tax funds exclusively, and may not repay them from the general fund raised by a general tax levy.

The demurrer is sustained. The issuance of a peremptory writ of mandate is denied.

We concur: EDMONDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; NOURSE, Justice pro tem.

9 Cal.2d 537

PEOPLE v. PATUBO.

Cr. 4104.

Supreme Court of California.

Sept. 1, 1937.

Rehearing Denied Sept. 30, 1937.

1. Homicide 🔑**253(3)**

Evidence sustained conviction for murder in the first degree on ground that defendant had a willful, deliberate, and premeditated intent to take victim's life.

2. Homicide 🔑**14(2)**

Premeditation is not controlled by lapse of time, which need be no greater than necessary to the formation of intention, and the formation of intention and doing of the act in pursuance of such intention may be in rapid succession.

3. Homicide 🔑**145**

Where an assault is made in a manner that is reasonably certain to produce death and which actually does cause death, the only rational presumption to be drawn therefrom is that the assailant intended to take life of person assailed.

4. Criminal law 🔑**1169(9)**

In murder prosecution wherein there was direct testimony that defendant held victim by arm while firing shots and defendant admitted range was no greater than six feet, no prejudice resulted if jury had been led by instruction on expert testimony into placing undue weight upon testimony of police officer that powder burns would not result at 15 or 20 feet, where his expert character had not been established.

5. Criminal law 🔑**762(2)**

The trial court may comment upon evidence as a whole or on testimony or credibility of any witness, providing its comment is temperately and fairly made and is not argumentative or contentious to a degree which makes it characteristically an act of advocacy, and its comment need not be confined to a colorless recital by way of summing up the facts under Constitution (Const. art. 6, § 19, as amended in 1934).

6. Criminal law 🔑**1186(4)**

In murder prosecution, comment of trial court indicating that in his opinion jury could render but one verdict and that was guilty of murder, where jury could have brought in no other verdict, but in opinion of reviewing court such comment probably contributed to imposition of the death penalty by jury, was reversible error (Const. art. 6, § 4½; § 19 as amended in 1934; Pen. Code, § 190).

SEAWELL, J., and NOURSE, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Sencio Patubo was convicted of murder in the first degree, and he appeals.

Reversed and remanded for a new trial.

Rehearing denied; SEAWELL, J., and NOURSE, Judge pro tem., dissent.

Stanley K. Lawson and J. P. Muller, both of Salinas, for appellant.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Dan G. Bardin, Deputy Dist. Atty., of Salinas, for the People.

WASTE, Chief Justice.

Defendant Sencio Patubo, a 25 year old Filipino, was charged by information with the murder in Monterey county on June 5, 1936, of David Dado, a Filipino, otherwise known as Big Boy. Defendant pleaded not guilty and went to trial. The jury returned a verdict of murder in the first degree, without recommendation, and judgment followed, imposing the death penalty. The case was brought to this court by the automatic appeal provision of section 1239 of the Penal Code (as amended by St.1935, p. 1868). The appeal has, however, been briefed by both sides. Three contentions are advanced by appellant, i. e.: (1) That the evidence does not support the verdict of murder in the first degree because there was no evidence of premeditation; (2) that an instruction was given which was not adapted to the evidence; and (3) that the trial judge exceeded the scope of proper judicial comment in that his remarks were argumentative and not impartial.

The crime was committed shortly before 11 p. m. on the evening of June 5, 1936, in the Avila dance hall and poolroom located in Monterey county about one and one-half miles out of Salinas on the road leading to Castroville. This dance hall was frequented largely by Filipinos employed on lettuce farms in the vicinity and by a few white girls supplied as dancing partners. On the night in question there were some thirty or more persons present in the hall. The crime marked the culmination of an altercation in which the following Filipinos became involved: Frank or

Frisco Nozallo, Leon Regenet, appellant Patubo, and Big Boy, the deceased. Frisco, Leon, and appellant somehow became engaged in a tussle, apparently with appellant and Leon lined up against Frisco. This scramble then developed into an altercation in which blows were exchanged between Leon and Frisco, with appellant passively standing nearby. Big Boy entered the dance hall and attempted to intercede between the two fighters, making such remarks as: "Why you fellows fighting, we are just all Filipinos." "What is going on here, stop fighting." "Wait a minute." As Big Boy drew near to the men, appellant stepped forth, drew a revolver, and holding it close to Big Boy's stomach, fired. Appellant then fired a second shot into Big Boy's chest, as he fell to the floor, shot him again, either once or twice. The evidence is that appellant fired either three or four shots at Big Boy, all of which hit their mark, and then, standing over Big Boy attempted still another shot, but when the revolver only "clicked" instead of firing, he then struck Big Boy on the head with it. Big Boy was removed to the hospital at 11:48 p. m. and expired about an hour later, at 12:30 a. m.

On the trial appellant attempted to show that he shot in self-defense. It appears that Frisco and Leon, in their fight were struggling for the possession of an ice pick as a weapon, and Frisco finally succeeded in getting the ice pick and stabbed Leon in the shoulder with it. Appellant, testifying in his own behalf, stated that on the night in question Frisco had asked him for a gun, stating that he wanted to shoot someone; that he told Frisco to keep quiet; that then Frisco started fighting with him (appellant); that Leon interceded to help appellant fight Frisco; that appellant then saw Leon bleeding at the shoulder and next saw the ice pick; that he saw a gun pointing at him (appellant) and thought it was Frisco or someone pointing it at him; that because he did not want to die, he then pulled his gun out and shot; that he fired three shots. Appellant stated that he did not know that Big Boy was his victim until the shooting was all over; that he had no grievance against Big Boy; that as a matter of fact Big Boy was carrying a gun, which appellant saw and extracted from his clothing after he fell to the floor. Appellant stated that when he left the dance hall he was carrying both weapons, his own and Big Boy's. He gave no explanation of the shots fired at Big Boy after he had fallen to the floor. His testimony was not consistent. He denied firing more than three shots and denied hitting Big Boy over the head after he had fallen to the floor. The prosecution's witnesses testified that Big Boy had no gun or knife in his hands at any time.

Two witnesses, Posado and Narcisso, testified to the following incident as occurring about four or five minutes before the shooting: The witnesses, Posado and Narcisso, were standing outside the dance hall where they saw appellant standing behind the door with a gun in his hand. They overheard appellant tell Leon to bring someone out, but the name of the person was not heard. Big Boy was standing near and told appellant to put his gun in his pocket. The record does not show whether appellant complied, but appellant did tell the witnesses, Posado and Narcisso, to go into the dance hall, and they did so immediately. Appellant denied this occurrence.

[1-3] We are satisfied that the evidence amply justified the jury in concluding that there was a willful, deliberate, and premeditated intent to take Big Boy's life. Premeditation is not controlled by lapse of time, which need be no greater than necessary to the formation of the intention, and the formation of the intention and the doing of the acts in pursuance of that intention may be in rapid succession. People v. Fleming, 218 Cal. 300, 23 P.(2d) 28, 33. The intent to kill is not denied here, and indeed, no other intention can reasonably be ascribed to appellant. On this point the language of this court in People v. Fleming, supra, is particularly appropriate: "And where, as in this case, the assault was made in a manner that was reasonably certain to produce death, and which actually did cause death, the only rational presumption to be drawn therefrom is that the assailant intended to take the life of the person assailed." The cases cited by appellant as authority for the proposition that murder done in the heat of passion is in the second degree only, predicate their rulings upon the fact that the passion is excited by adequate provocation. People v. Elmore, 167 Cal. 205, 138 P. 989; People v. Freel, 48 Cal. 436. There is no suggestion of provocation in the record here. On the contrary, much of the evidence strongly indicates that appellant was the aggressor in a somewhat complicated quarrel.

[4] Appellant complains of the giving of an instruction on the effect of expert testimony. It is urged that since the only persons who testified as experts were the doctor, whose testimony was given without objection, and Rogers, a member of the Salinas police department, the question of whose qualification was never passed upon, the jury was misled by the giving of the instruction, into placing undue weight upon the testimony of Rogers. This testimony was directed toward establishing powder burns on the clothing of the deceased to show the range at which the shots were fired. Appellant's point is that this tended to discredit the claim of self-defense by showing appellant could have made no mistake about the deceased having a gun. Since there was direct testimony that appellant held Big Boy by the arm while firing the shots and appellant himself admitted the range was no greater than six feet, no prejudice could have been suffered by the jury's having been led by the instruction into placing undue weight upon the testimony of one whose expert character had not been established. Furthermore, Rogers was never permitted to testify to the distance at which a powder burn would result, but only that it would not result at fifteen or twenty feet.

Appellant objects to certain comments made by the trial judge when instructing the jury, as being argumentative and not impartial. Among other things the judge said, addressing the jury: "In my judgment, and judging from the evidence I have heard here, it was the intention of that man to kill Big Boy for some reason. I don't know why, but it was his intention to kill Big Boy in that pool hall that night and I believe one of the reasons * * *." (reference being made to his belief in other witnesses and to the nearness of deceased to appellant when shot). Further: "Now you can see this man's manner of testifying in the courtroom when he was on the witness stand. He had that hangdog look of a guilty man. He could not talk hardly above a whisper and he could not talk so the court could hear him. * * * If ever a man by his appearance and his manner of giving testimony has shown himself to be a willful, deliberate and outright perjurer as to material facts in a case, the defendant in this case has been it."

Finally: "Now there is self defense in this case. No man could be safe when the man testified himself in the courtroom he fired that third shot at that poor man lying with his hands on the floor. Is that self defense? He admits that is when he fired that third shot. He admitted that himself before you. In the opinion of the Court this man is guilty of first degree murder and the extent of the punishment he is to receive in this matter is a question for the jury."

[5] Under the recent amendment (1934) to section 19 of article 6 of the State Constitution, a greater latitude is permitted trial judges in instructing jurors than was allowed before its adoption. People v. Ottey, 5 Cal.(2d) 714-729, 56 P.(2d) 193. Under the constitutional amendment, "A trial court may * * * comment upon the evidence as a whole or upon the testimony or credibility of any witness providing its comment is temperately and fairly made and is not argumentative or contentious to a degree which makes it characteristically an act of advocacy. Its comment is not confined to a colorless recital, by way of summing up the facts. Such a conclusion would destroy and render ineffectual the very purpose of the constitutional amendment. It is impossible to set down a hard and fast rule, each case must necessarily turn upon its own peculiar circumstances. Trial courts should, of course, be cautious in their exercise of this power with a view to protecting the rights of defendants. An examination of the federal cases on the subject indicates that while the trial court may not direct a verdict of guilty, either directly or indirectly, it may analyze the evidence and comment and express its views with regard to the testimony of the witnesses, leaving the ultimate determination of the issues of fact fairly to the jury." People v. De Moss, 4 Cal. (2d) 469, 50 P.(2d) 1031, 1034.

[6] While in the case before us the trial court admonished the jury it was their duty to judge the credibility of the witnesses and arrive at a verdict for themselves and that his comment was but advisory, we are of the view that the quoted portion of the charge went far beyond the province of the court in such matters and passed the limitation that such comments shall not invade the province of the jury. No fixed rule or formula can be laid down, and, particularly under the present law, the comment is not confined to a colorless recital merely by summing up of the facts. The effect of the constitutional amendment has but recently had the consideration of this court in two cases,

each involving the infliction of the death penalty. People v. Ottey, supra, and People v. Gosden, 6 Cal.(2d) 14, 56 P.(2d) 211. The whole question was reviewed in those cases, and we deem it unnecessary to so soon again review the matter. Suffice it to say that in each case a critical analysis of the comment made by the trial judge was made and we were unable to decide that the comment amounted to an invasion of the province of the jury. We cannot reach a similar conclusion in this case.

The comment of the trial court was not that of an impartial judge. In his opinion there was but one verdict the jury could render—a verdict of guilty of murder, the penalty for which the jury in its discretion, as provided by the statute, might fix. Such is the express language the trial court used. The beneficent provision of section 4½ of article 6 of the Constitution which provides that no judgment shall be set aside on the ground (among other grounds) of misdirection of the jury cannot be invoked in such a case as this. We are convinced the jury would have brought in no other verdict than that the defendant was guilty of murder. The evidence of the facts admitted of no other verdict. The jury undoubtedly would have found the defendant guilty of murder had not the comments been made by the trial court. Under its discretion (Pen.Code, § 190), would it have pronounced the death penalty? Who knows? Who can tell? May not the severe castigation and bitter denunciation of the defendant by the trial court have contributed to that result? It is possible, and in our view probable that it did.

The judgment is reversed, and the defendant is remanded for a new trial.

We concur: EDMONDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

SEAWELL, Justice (dissenting).

We dissent. The murder, as shown in this case, was committed in a cold-blooded and brutal manner, and the defendant in the perpetration of the crime exhibited a firm determination to take life. The evidence is conclusive to the effect that the defendant fired three shots into the body of the deceased, and, after he had fallen to the floor, he beat him on the head with the butt end of his revolver. There is no semblance of justification of self-defense shown by the evidence, and no circumstance of mitigation can be offered on behalf of the defendant.

While we do not approve all that the trial court said in his review of the evidence, especially the reference made by the court to the defendant, we are satisfied that the jury acting upon the practically uncontradicted evidence could not have done otherwise than to have rendered the verdict it returned.

Article 6, section 4½ of the Constitution, provides that no judgment shall be set aside or new trial granted on the ground of misdirection of the jury, or for any error as to any matter of procedure, unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Under the constitutional provision, as now written, we must be able to say affirmatively that the error complained of resulted in a miscarriage of justice. This we think cannot be said upon an examination of the entire cause. It will be noted that the court informed the jury that the responsibility in fixing the punishment was a matter entirely within its discretion.

I concur: NOURSE, Justice pro tem.

22 Cal.App.2d 392

PEOPLE v. SBERNO (two cases).

Cr. 2980, No. 2981.

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1937.

1. Criminal law 🔑444

In prosecution for robbery and for assault with intent to commit murder, written statement purporting to be a transcript of questions put to defendant by a Chicago policeman and defendant's answers thereto was admissible where a local police officer testified that he had read the statement to defendant who admitted that he had made the answers therein contained.

2. Homicide 🔑257(1)
Robbery 🔑24(1)

In prosecution for robbery and for assault with intent to commit murder, evidence *held* to justify finding that assault committed by defendant's confederate on victim who resisted robbery was in furtherance of the common design and hence, fact that defendant did not fire his gun but was about to drop it when resistance was offered did not excuse him from responsibility for his confederate's act.

3. Criminal law 🔑791

In prosecution for robbery and for assault with intent to commit murder, instruction as to responsibility of each conspirator for acts of others was not prejudicial because it failed to qualify rule with that applicable when one conspirator departs from original design so as to be alone responsible for his act where defendant offered no instructions on such point and question of whether shooting was done in furtherance of a common criminal design could scarcely be considered in issue.

4. Criminal law 🔑1172(1)

In prosecution for robbery and for assault with intent to commit murder, instruction with respect to alibi which was in substance the same as that offered by the defendant except that court omitted to state that such a defense was as legitimate as any other was not prejudicial.

5. Criminal law 🔑1166(10)

Evidence *held* insufficient to show prejudice to defendant caused by the refusal to allow a reasonable continuance for the purpose of preparing an adequate defense on a showing that one of defendant's attorneys was ill.

6. Criminal law 🔑1170½(5)

In prosecution for robbery, questions on cross-examination of defense witnesses aimed at eliciting fact that defendants recently had been tried for other crimes were not prejudicial even if not permissible attempts at impeachment.

7. Criminal law 🔑1038(3), 1172(1)

In prosecution for robbery, instruction on circumstantial evidence was not prejudicial because it failed to state that all circumstances must not only be consistent with each other but inconsistent with every other rational hypothesis except that of guilt where it did not appear that defendant requested such an amendment to the instruction or any instruction on subject and defendant was not convicted on circumstantial evidence.

8. Names 🔑16(2)

In determining whether defendant Sberno had sustained a prior conviction of a felony where copy of judgment of conviction showed a conviction under name of Sberna the principle of idem sonans applied.

9. Criminal law 🔑1202(3)

In prosecutions for robbery and for assault with intent to commit murder of defendant alleged to have sustained a prior conviction, evidence *held* to identify defendant as person who had suffered the prior conviction.

◆

Appeals from Superior Court, Los Angeles County; Charles W. Fricke and Thomas L. Ambrose, Judges.

Mike Sberno was convicted of robbery, of assault with intent to commit murder, and was found to have been convicted of the crime of "interstate theft," and he appeals.

Affirmed.

George A. Glover and Richard A. Haley, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

PER CURIAM.

Each of these appeals is from judgments of conviction entered upon the verdict of a jury and from an order denying defendant's motion for a new trial. On the trial of the first case (No. 2980), defendant was found guilty of the crimes of robbery and assault with intent to commit murder, as charged in counts I and II, respectively, of the information. The trial of the second case resulted in verdicts of guilty on each of three counts of robbery. It was also found by each jury that theretofore defendant had been convicted of the crime of "interstate theft" in the District Court of the United States for the Northern District of Illinois.

The evidence in the first case discloses that on the night of May 7, 1936, in the city of Los Angeles, two armed men, one of them assertedly the defendant, entered and robbed a service station which at that time was being operated by two women, one of whom drew a revolver from a drawer and commanded the robbers to drop their weapons, whereupon defendant's companion shot and wounded her.

[1] The contentions of appellant, that the court erred (1) in admitting in evidence a written statement purporting to be a transcript of an interview wherein defendant made certain admissions; (2) in declining to dismiss count II of the information; (3) in giving an instruction on the subject of the defense of alibi framed by the prosecution and rejecting an instruction on the same subject offered by the defendant; (4) in instructing the jury that each conspirator was liable for the acts of his coconspirator done in furtherance of the conspiracy; and (5) in denying the motion for a new trial for each of the foregoing reasons, are without merit. The written statement referred to purported to be a transcript of questions put to the defendant by a Chicago policeman and his answers thereto. A Los Angeles police officer testified that he read the statement to defendant, who admitted that he had made the answers therein contained. With this foundation the statement properly was admitted in evidence.

[2-4] The fact that defendant did not fire his gun, but was about to drop it when resistance was offered, does not excuse him from responsibility for his confederate's act. The evidence was ample to justify the jury in finding that the assault was in furtherance of a common criminal design. People v. Kauffman, 152 Cal. 331, 92 P. 861. Both the man identified as defendant and his companion were armed. They jointly undertook a robbery and used their weapons to frighten their victims into submission. It is highly improbable that the robbers, before acting upon their plans, agreed between themselves to surrender upon a showing of armed resistance by their proposed victims. "Pistols are not used for breaking into a safe; their purpose is to kill those who interfere to prevent a burglary or arrest the perpetrators." People v. Woods, 147 Cal. 265, 81 P. 652, 655, 109 Am.St. Rep. 151. Not only did the court properly decline to dismiss count II, but it did not err in its instruction to the effect that each of a group of conspirators is criminally responsible for the acts of his associates committed in furtherance of their common design and "which follow incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original * * * plan." People v. Kauffman, 152 Cal. 331, 334, 92 P. 861, 862. Appellant asserts that it was prejudicial error for the court to omit the following qualification of the rule just stated (also found in People v. Kauffman, supra): "Even if the common design is unlawful, and if one member of the party depart from the original design as agreed upon by all of the members, and do an act not contemplated by those who entered into the common purpose, but was not in furtherance thereof, and not the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful would alone be responsible therefor." Appellant offered no instructions upon this point. Moreover, since the evidence as to what occurred at the time of the robbery was uncontradicted, and since the defendant contended upon the trial that he was wholly innocent of the charges, the question of whether or not the shooting was in furtherance of a common criminal design could scarcely be considered as seriously in issue. In the circumstances, defendant suffered no discernible prejudice either from that omission or from any of the other asserted errors in the instructions upon this subject. The instruction on the subject of alibi was in substance the same as that offered by defendant, the only material difference being that the court omitted to state that "this defense is as proper and legitimate as any other."

In the second case, No. 2981, defendant was convicted on three counts of robbery. The facts were as follows: On or about May 7, 1936, according to the testimony of one L. C. Slosson, defendant and a companion entered the service station of which Slosson was the manager and threatened to shoot him if he did not open the safe. The witness, who did not have the keys to the safe, convinced the robbers that he could not open it, and thereupon they took what money the witness had in his pockets and departed. The conviction on the second and third counts was based on testimony to the effect that about March 7, 1936, defendant and a companion entered a combination grocery and post office substation, and at the point of a gun compelled the clerk of the store to give them the money that was in the safe, and compelled the proprietress, who also was the postmistress, to hand over the money that was in the drawer in the post office. Defendant offered testimony that he was elsewhere at the time the robberies were committed, and in rebuttal the prosecution offered the testimony of the two witnesses who had identified defendant as a participant in the service station robbery involved in the first case hereinbefore discussed. Appellant's "specification of errors" includes the claim that "the court erred in refusing to consolidate counts II and III of the amended information"; but no argument or further reference is made thereon or thereto, and from the evidence it appears not to be well founded.

[5] Appellant's first point is that the cout erred "in refusing to allow a reasonable continuance for the purpose of preparing an adequate defense," upon a showing that one of defendant's attorneys was ill. Defendant entered his pleas on January 7, at which time his two present counsel were permitted to withdraw from the case. On January 14, Mr. Haley, one of the counsel who had withdrawn, was reappointed to represent defendant. The application for continuance, supported by affidavit, was presented by Mr. Haley on February 9; and although it was refused, the case did not actually go to trial until February 18, because of the pending trial of the first case. Mr. Haley was the only counsel of record. His affidavit stated that the illness of the other counsel had necessitated Mr. Haley's doing the business of both. Counsel in their brief assert that defendant was prejudiced by the fact that for lack of time to confer with counsel, the defense witness Pecora omitted to consult his business records, and hence was obliged to testify solely from memory as to whether defendant actually was employed by him on certain crucial days, to the injury of the witness' credibility. This witness, a resident of Los Angeles, was the only defense witness who did not testify at the first trial. The trial of this case began on February 18, but selection of the jury was not completed until February 23. After adjournment on the 19th, the trial was not resumed until the 23d, because of the weekend and an intervening holiday. It thus appears that counsel had ample time to confer with all the witnesses. The showing of prejudice attempted to be made in the briefs of counsel is insufficient, and the record does not disclose that any better showing, or any showing whatever, was made on the motion for a new trial.

[6] It is asserted that the court erred in permitting questions by the deputy district attorney on cross-examination of defense witnesses aimed at eliciting the fact that defendant recently had been tried for other crimes; and, further, that the deputy district attorney's efforts in this regard were successful and constituted prejudicial misconduct. It appears that the questions asked were permissible attempts at impeachment; but in any event, by no means had they the effect attributed to them by appellant. The prejudice to appellant, if any, in this respect, furnishes no legal cause for complaint.

[7] The court gave an instruction on the subject of circumstantial evidence, to which objection is now made on the ground that it should not have been given at all and on the further ground that the court should have included therein a statement to the effect that "all of the circumstances must not only be consistent with each other, but inconsistent with every other rational hypothesis except that of guilt." It does not appear that appellant requested such an amendment to the instruction or any instruction on the subject. In this case appellant was convicted upon the evidence of eyewitnesses; not upon circumstantial evidence. Since there was no evidence to which the jury might have applied the instruction, we are unable to see how appellant was prejudiced thereby.

We think that the evidence in each case on the subject of the alleged prior conviction was sufficient to sustain the verdict of the jury thereon. An authenticated copy of the judgment of conviction of one "Mike Sberna" of the crime of "interstate theft" in the District Court of the United States for the Northern District of Illinois was introduced by the prosecution. In moving to dismiss that portion of the charge, defendant did not contend that the evidence of identity was insufficient, but confined his objection to the point that there was no evidence of his having served a term of imprisonment upon that conviction. In each case the allegation that defendant had served a term of imprisonment for that felony was stricken from the information and no finding was made thereon by the jury.

Although there are two lines of authority, one holding that "identity of the name of the defendant and the person previously convicted is prima facie evidence of identity of person, and, in the absence of rebutting testimony, supports a finding of such identity" (85 A.L.R. 1107); and the other to the effect that identity "must be established by affirmative evidence; mere proof of identity of names not being sufficient" (85 A.L.R. 1111); some of the authorities cited in support of the latter statement may readily be reconciled with those which hold that the presumption is sufficient. For instance, the presumption, as an "isolated fact," was held to be insufficient when applied to a very common name, as in State v. Smith, 129 Iowa, 709, 106 N.W. 187, 4 L.R.A.(N.S.) 539, 6 Ann.Cas. 1023. In other cases it was held that the presumption of identity was not sufficient to warrant the court in holding that the prior conviction had been established as a matter of law, but that the question must go to the jury. State v. Bruno, 69 Utah, 444, 256 P. 109; State v. Lashus, 79 Me. 504, 11 A. 180. In this state, in the case of People v. Williams, 125 Cal.App. 387, 13 P.(2d) 841, 842, it was said:

"The record discloses the fact that preceding the introduction of testimony by a witness to the effect that defendant had admitted to him all the facts relevant to the charge of prior conviction, the prosecution introduced in evidence certified copies of the record in the superior court, in and for the county of Yuba, this state, by which it appeared that theretofore in said court a man by the same name as defendant had pleaded guilty to * * * burglary. * * *

"Although prior to the reception in evidence of the admission of defendant which is the subject of appellant's present objection, defendant had not been identified as the person who theretofore had been convicted of a felony, it is noted that the name of the defendant who was convicted in Yuba county is identical with that of the defendant in this action. It is a rule of law that identity of person may be presumed from identity of name (subd. 25 § 1963, Code Civ.Proc.); also that a presumption constitutes a species of evidence which, unless controverted, is sufficient proof of the existence of the fact to which it relates. 10 Cal.Jur. 746, and authorities there cited. It is therefore apparent that, in the circumstances presented by the record which preceded the admission in evidence of testimony in substance that defendant had admitted his prior conviction, at least a prima facie case had been established against him with reference to his former conviction of a felony. In the case of People v. Hettick, 126 Cal. 425, 428, 58 P. 918, 919, where a similar question was presented for the consideration of the appellate tribunal, it was said:

" 'In support of the charge of previous conviction of grand larceny the prosecution placed in evidence records of the superior court of San Diego county showing the conviction and sentence to one year in the state prison at San Quentin of "George Hettick" for the crime of grand larceny in having stolen a mare, the personal property of J. C. Pelton. The testimony of Charles Bell, a witness for the prosecution, was to the effect that the defendant had admitted to him that he was sent to state prison at San Quentin for stealing a horse from John C. Pelton. * * *

" 'There was nothing to contradict or discredit the foregoing evidence, and we deem it sufficient to support the verdict for the people on the charge of a prior conviction of larceny.'

"In addition to the facts hereinbefore set forth, the record herein discloses the fact that on cross-examination defendant testified that theretofore, in the county of Yuba, he had been convicted of the crime of 'larceny'. It follows that, with reference to the point under consideration, defendant has no just ground for complaint."

In People v. Foster, 3 Cal.App.(2d) 35, 39 P.(2d) 271, 273, where the appellate court held that the certificate of the warden of the Louisiana state prison was not properly authenticated and therefore not competent evidence, with the result that the only evidence in this case on the subject of prior conviction was an exemplified copy of the judgment of conviction of a person of the same name as defendant, it was held that there was "no competent evidence that this appellant actually served time in the Louisiana state prison for the prior conviction of robbery, or that he is the same person who was sentenced to imprisonment in that institution."

In People v. Willison, 116 Cal.App. 157, 159, 2 P.(2d) 543, it was held that the record of conviction of one James Mallek, together with identification of defendant as a former prisoner known as "Tony Mallach," was insufficient; as also was the record of one Edward Powers together with the identification of defendant as a former prisoner under the name of "John or George Powers."

In People v. Gillispie, 104 Cal.App. 765, 286 P. 502, 503, it appeared that the prosecution had introduced a certified copy of the proceedings upon the sentence of one Gillespie to imprisonment in Folsom for the crime of burglary. Although the court said that "the principle of idem sonans applies" to the slight difference in the spelling of the name, it did not directly hold that the court record standing alone would have been sufficient evidence notwithstanding the difference in the names, but concluded that the record, together with testimony of admissions by defendant that he had served a term in Folsom prison constituted sufficient evidence.

In many of the cases wherein the presumption of identity from identity of names was said to be sufficient, reference is made to attendant facts and circumstances which strengthened that presumption. In Hefferman v. United States (C.C.A.) 50 F.(2d) 554, 557 it was said:

"The government introduced the record of two prior convictions in the same court of a man of the same very unusual name for the same offenses of selling liquor and maintaining a nuisance at the same address * * * in the same city and in the same judicial district. There was no other identification of the * * * defendant; yet this, we hold, was prima facie identification. * * * As the defendant introduced no evidence to the contrary, the prima facie evidence of identity stood undisturbed."

And in State v. Bizer, 113 Kan. 731, 216 P. 303, 304, it was said: "The presumption of the identity of parties arising from the identity of names may be strong or weak, depending upon many circumstances. If the name is a common one, the presumption is not so strong as if the name is unusual. The relation of time, place and circumstances has much bearing upon the force to be given to the presumption."

[8, 9] Considering the fact that the names "Sberna" and "Sberno" might well be said to fall within the designation of "idem sonans" (People v. Gillispie, 104 Cal. App. 765, 286 P. 502); that the given name is the same in each instance, and that the surname is an uncommon one; and therefore applying the presumption of identity of person; and in view of the further evidence which appears from the whole record in each case, that defendant was a resident of Chicago, within the judicial district in which the prior conviction was had; that the earlier crime was similar to those of which he was accused herein; together with the proof of his admission in the one case that he had "done time"; and his failure, although in each case he testified in his own behalf, to deny such prior conviction; considering these circumstances, we are of the opinion that defendant may not justly complain of the prosecution's failure to produce further evidence of the identity of Sberna and Sberno. In this connection, it should be noted that in each case, upon cross-examination of defendant, he was asked the usual question for the purpose of impeachment, "You have heretofore been convicted of a felony?" to which he answered that he had, "Once."

The judgments in each case are affirmed; also, the orders in each case by which defendant's motion for new trial were denied are affirmed.

COMMERCIAL CREDIT CO. v. BARNEY MOTOR CO. et al.*

Civ. 5574.

District Court of Appeal, Third District, California.

July 21, 1937.

Hearing Granted by Supreme Court Sept. 16, 1937.

1. Estoppel ⚿75

Conditional seller of personalty who knows that buyer, engaged in sale of similar articles, has placed property on display for sale with such other articles, is estopped to assert his reserved title against a bona fide subvendee for value (Civ.Code, § 1142).

2. Estoppel ⚿76

A true owner of personalty, who has delivered possession to a seller of similar property with knowledge that it will be sold, is estopped to assert title against a subvendee if such subvendee is innocent and without knowledge, either actual or constructive, of the true nature of the title of the property and has relied upon the apparent indicia of title in his vendor coupled with its possession.

3. Principal and agent ⚿103(7)

Mere possession of personalty is insufficient evidence of authority to sell to protect a purchaser, but possession must be coupled with some evidence of authority from owner to sell according to the custom of the trade.

4. Estoppel ⚿119

Existence of estoppel is a question of fact.

5. Estoppel ⚿76

Owner, who delivered automobile to dealer under a deed of trust for resale for cash, was not estopped to assert title against assignee of dealer's conditional sales contract on automobile, where assignee was familiar with custom of trade in such a transaction, but nevertheless furnished money for the unauthorized sale for credit, since assignee's information was sufficient to put him on inquiry (Civ.Code, § 19).

* * *

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action in claim and delivery by the Commercial Credit Company against the Barney Motor Company and others, wherein the American Trust Company filed a third party claim. Judgment in favor of the third party claimant, and plaintiff appeals.

Reversed.

R. G. Partridge and Ralph E. Bancroft, both of San Francisco, for appellant.

Gregory P. Maushart, of Los Banos, for respondents.

D. O. Germino, of Los Banos, for respondent American Trust Co.

PER CURIAM.

This litigation concerns the right to the possession of a Plymouth automobile.

An action in claim and delivery was brought by the Commercial Credit Company against Barney Motor Company and certain others, wherein it was alleged that the Credit Company was the owner of the automobile and entitled to the possession thereof, which was wrongfully withheld by the Motor Company. The car was seized by the sheriff, whereupon American Trust Company filed a third party claim, demanding the delivery of the automobile, under the terms of a conditional sales contract entered into between itself and Barney Motor Company and Bernard A. Negra.

As a result of this demand a hearing was had, and the following facts adduced:

In April, 1935, the Chrysler distributor for Northern California sold to appellant, Commercial Credit Company, the automobile in question. The same day, and after the execution of the bill of sale, the automobile was delivered to defendant Bernard A. Negra, and a trust receipt was executed by defendant Negra, the Chrysler-Plymouth dealer in Los Banos, in favor of the Commercial Credit Company. In this trust agreement the dealer Negra acknowledged receipt of the automobile from the Credit Company and agreed to hold the same in trust for the Credit Company as its property, and agreed not to lend, mortgage, pledge, encumber, operate, or use said automobile. Negra, the dealer, was granted the right to sell for cash only and to deliver the proceeds of said sale forthwith to the Credit Company. From time to time the Credit Company checked the presence of the car at the dealer's establishment, and although upon one or two occasions the car was found in the possession of Mr. Tonolla, a salesman of the Motor Company, it still carried dealer's license plates and no white slip was found in the car. Possession of the car by Tonolla aroused no suspicion in the minds of the investigators for the Credit Company, as sometimes cars under trust receipts were permitted to be used for demonstration purposes by the dealer or his salesmen.

---

*For subsequent opinion see 76 P.2d 1181.

However, while the car was still in the possession of Negra, he purported to sell this automobile to his employee, Mr. Tonolla. Negra and Tonolla went to the office of the American Trust Company, respondent herein, and executed a conditional sales contract from Negra, as the seller, to Tonolla, as the purchaser. Attached to this conditional sales contract was an assignment by the seller of all of his right, title, and interest to respondent American Trust Company, in consideration of which the Trust Company advanced to the seller the purchase price of the car. Immediately after this transaction with the American Trust Company, the car was registered with the division of motor vehicles showing the American Trust Company as legal owner and Tonolla as registered owner thereof. Upon the discovery by the Credit Company of the contract to Mr. Tonolla and the taking of the title in the car by the bank, this action in claim and delivery was commenced by the Credit Company.

It is stipulated that the Credit Company had not been paid for the automobile and that demand for its return had been made.

From these facts the court found that respondent Trust Company was a bona fide subvendee for value and that appellant Credit Company was estopped from asserting its title and adjudicated the respondent Trust Company was entitled to the possession of the automobile.

There seems to be no contention but that as between the Credit Company and the Motor Company the trust agreement was binding and enforceable. It is as to the rights of the intervening third party, the Trust Company, that we are here concerned.

[1] Conditional sales contracts are fully recognized in this state, but it is clearly settled that if personal property is delivered under a conditional sales contract to a buyer who is engaged in the business of selling property of the same kind, and with the knowledge of the seller the property is placed on display for sale with such other articles, the holder of the reserved title is estopped to assert it against a bona fide subvendee for value. Civ.Code, § 1142; California Standard Finance Corporation v. Riverside Finance Company, 111 Cal. App. 151, 295 P. 555.

[2] The test for the application of this principle is set forth in Pacific Finance Corporation v. Hendley, 119 Cal.App. 697, 7 P.(2d) 391, and is that: First, a true owner of the property must have delivered its possession to a seller of similar property with knowledge that it will be sold; secondly, the purchaser must be, in effect, innocent and without knowledge either actual or constructive of the true nature of the title of the property; and, third, must have relied upon the apparent indicia of title in the seller coupled with its possession.

[3, 4] Mere possession, as was stated in Carter v. Rowley, 59 Cal.App. 486, 211 P. 267, is not sufficient evidence of authority to sell to protect one who purchases from the possessor, but in addition to the possession by the vendor the owner must have given some evidence of authority to sell according to the custom of the trade, and if, here, the sale had been made to an innocent purchaser for value, he would have secured good title to the automobile. He is protected against any claim by the real owner upon the element of estoppel. The existence of an estoppel, however, is a question of fact. Parke v. Franciscus, 194 Cal. 284, 228 P. 435. The question here is to determine if there was sufficient evidence to establish such an estoppel. This court has held in Mohr v. First National Bank, 69 Cal.App. 756, 232 P. 748, a trust receipt executed under circumstances similar to the present situation is sufficient to support a finding that title was in the Credit Company. Was the bank here an innocent purchaser for value? In the first place, the distinction between the purchase of the personal property and the acquisition of a conditional sales contract resulting from the sale of such property must be recognized. In Henderson v. General Acceptance Corporation (Cal.App.) 280 P. 1013, the court used this language: "The other authorities cited by appellants relate to an automobile itself and not to the contract of sale of an automobile. They would each be good authorities in support of the title of Jewatt (the innocent purchaser in this case) even though he bought on credit when Hunter's real authority was to sell for cash; but they are of no assistance to appellant which did not buy the automobile that Hunter was authorized to sell, but the Jewatt contract which Hunter was not authorized either to make or sell."

To the same effect was the holding of the Supreme Court in denying a hearing in the case of Pacific Finance Corporation v. Hendley, 103 Cal.App. 335, at page 340, 284 P. 736, 285 P. 1048, where the court said: "The Court.—The petition for a hearing herein is denied. In denying said petition, we withhold our approval of that portion of said opinion which purports to hold that a mortgagee is protected by the provisions of section 1142 of the Civil Code in the same way and to the same extent that a buyer under an executed sale of personal property from a person having possession thereof with power to dispose of the same, is afforded protection by said section. While in some cases the words 'buyer' and 'purchaser' are used synonymously, and in others a 'purchaser' has been held to include a 'mortgagee,' we know of no authority, and none has been cited by the respondent, which goes so far as to hold that a mortgagee is ever 'a buyer at an executed sale.' "

[5] Aside from this distinction, however, we believe the bank was put upon inquiry as to the right of the Motor Company to sell the particular car in question.

It appeared Mr. Enos, the branch manager of respondent bank at Los Banos, was familiar with the method of "flooring" used by the Commercial Credit Company. It appears that this is a plan often used by finance companies and automobile dealers whereby a finance company buys from the wholesaler or distributor new cars and places them with a dealer, and the dealer, with the consent of the finance company and under the terms of the trust receipt, then sells to customers as they appear, and remits the net amount previously paid by the finance company to such company, retaining the difference received from the purchaser as profit. These cars "floored" for the dealer and unsold are not registered under the Vehicle Code until so sold.

Mr. Enos knew of this method of financing the automobiles locally. Mr. Negra had called upon him to ascertain if his bank would operate in that manner. Mr. Enos made no inquiries, however, of Mr. Negra or Mr. Tonolla as to whether or not this particular car had been previously floored.

In California Standard Finance Corporation v. Riverside Finance Co., supra, the rights of an innocent purchaser of a floored car are discussed. Mr. Enos, the branch manager of respondent Trust Company, testified as follows:

"Q. You do know that Negra may or may not have had the right to sell that car, didn't you? A. Naturally.

"Q. And you didn't inquire whether he did or not, did you? A. No."

He testified further:

"Q. Do you know the practice among automobile dealers to floor their new cars? A. Yes. * * *

"Q. You know, for instance, on the date this contract was brought in to you for you to lend money on, that on that date many of the dealers in Los Banos were flooring their new cars, don't you? A. Yes. * * *

"Q. Now let me ask you there, had Mr. Negra prior to the date the contract was taken up by you, had he asked you to floor his new cars? A. He hadn't asked us, he asked if the bank was entering into the plan of flooring. * * *

"Q. At the time the contract was brought over to your establishment on this particular car, did you inquire of Mr. Negra whether it was floored in fact? A. I did not. * * *

"Q. Did you make any effort whatever to ask anyone or inquire of anyone whether Mr. Negra had title to it, had the right to sell it, and whether or not it was floored? A. I did not.

"Q. You knew it may or may not be floored? A. Right. * * *

"Q. You did not take any steps to find out whether it was floored or not? A. No."

These facts were sufficient to put the bank upon inquiry and definite information obtained from the distributor and others. Section 19, Civ.Code.

The admissions by the witness and the surrounding circumstances, we believe, bring this case within the rule found in the following cases: Henderson v. General Acceptance Corporation (Cal.App.) 280 P. 1013; Henderson v. General Acceptance Corporation, 209 Cal. 268, 286 P. 1014 (hearing granted in the Supreme Court on certain points not here involved); California Finance Corporation v. Riverside Finance Company, supra.

Without discussing the many cases bearing upon the principles here involved, we believe that sufficient has been set forth to justify a reversal of the judgment appealed from, and it is so ordered.

22 Cal.App.2d 418

LOS ANGELES SHIPBUILDING & DRY DOCK CORPORATION v. LOS ANGELES COUNTY.

Civ. 10509.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1937.

Rehearing Denied Sept. 24, 1937.

Hearing Denied by Supreme Court Oct. 21, 1937.

1. Taxation 🔑446

Attempted assessment of exempt property is a nullity.

2. Taxation 🔑454

An appeal will lie to the board of equalization from an assessment of property which is a proper subject of taxation even though the property has no taxable value, notwithstanding board is without authority to strike an assessment, since board's determination in such case is still based on question of the taxable value of the property rather than on whether the property is a proper subject of taxation (Pol.Code, § 3804).

3. Taxation 🔑543(2)

The requirement that an appeal to the board of equalization be taken in cases of overvaluation in assessment for tax purposes as a prerequisite to an action to recover taxes paid is grounded on public policy.

4. Taxation 🔑543(2)

Alleged error of assessor in assuming certain sum was total amount of rent paid by taxpayer for use of the assessed premises was not a "clerical error" such as to furnish basis for action to recover taxes paid without previous appeal to the board of equalization (Pol.Code, § 3804).

[Ed. Note.—For other definitions of "Clerical Error," see Words & Phrases.]

5. Taxation 🔑543(2)

A "clerical error" such as will furnish basis for an action to recover taxes paid without previous appeal to board of equalization is such as exists when without evident intention one word is written for another, as result of a mistake in copying or writing, and excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination (Pol.Code, § 3804).

6. Taxation 🔑543(2)

Although the basis of taxation is not property but its value, property which belongs to a class which is subject to taxation but is without taxable value is not "nonexistent property for tax purposes" in the sense that an action for recovery of taxes paid can be maintained without a previous appeal to the board of equalization (Pol.Code, § 3804).

7. Taxation 🔑188

Leases from the state and its political subdivisions form a class of property which is taxable.

8. Taxation 🔑188

A lease which entitled the owner to the use of certain tide lands owned in fee by the city of Los Angeles was taxable property.

9. Taxation 🔑543(2)

The assessment of a lease, which was a proper subject of taxation, by an assessor who was alleged to have erroneously assessed the lease at $500,540 when he should have assessed it at zero, constituted an overassessment of existing property and not an assessment of nonexistent property as respects necessity for an appeal to the board of equalization as a condition prerequisite to an action to recover taxes paid thereon (Pol.Code, § 3804).

10. Taxation 🔑543(2)

The owner of a lease of tide lands owned in fee by the city of Los Angeles was not entitled to recover taxes paid without prior appeal to the board of equalization on ground that tax was really laid on city's exempt fee in the property, where the assessor had undertaken to assess the leasehold interest and not the fee, but allegedly miscalculated the value of the leasehold interest (Pol.Code, § 3804).

11. Taxation 🔑543(2)

An action to recover taxes allegedly based on an assessment in excess of the full cash value of the property must be predicated upon a prior appeal to the board of equalization (Pol.Code, §§ 3627, 3804).

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Los Angeles Shipbuilding & Dry Dock Corporation against Los Angeles County, a body corporate and politic. Judgment for defendant pursuant to an order sustaining a demurrer to plaintiff's complaint without leave to amend, and plaintiff appeals.

Affirmed.

Holbrook, Taylor, Tarr & Reed, W. Sumner Holbrook, Jr., and John Harlan Dawson, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

DOOLING, Justice pro tem.

This is an appeal by plaintiff from a judgment for defendant entered pursuant to an order sustaining a demurrer to plaintiff's complaint without leave to amend.

The action was one under Political Code, § 3804, to recover taxes paid to defendant county for the tax year 1931-32. The complaint is in 5 counts, but, except for certain allegations of the pleader's reasons why in his opinion the tax is recoverable, the ultimate facts are similarly alleged in each count, being incorporated from count 1 into the later counts by appropriate reference. In our opinion, plaintiff must stand or fall on the allegations contained in count 1 of the complaint, as nothing is added to the allegations of the ultimate facts in the later counts except the pleader's conclusions.

In the complaint it is alleged that plaintiff is the owner of a permit or lease entitling it to the use of certain tide lands, the fee to which stands in the city of Los Angeles; that the agreed rental for the first 10 years of such lease is the nominal annual rental of $100, plus the value of certain improvements placed in and upon said tide lands by predecessors in interest of plaintiff, "that the true and correct monetary value of the annual rental being so paid to the City of Los Angeles * * * on the first Monday in March, 1931, was the total sum of $557,427.67"; that the said leasehold interest of plaintiff was assessed for tax purposes by the assessor for the tax year 1931-32 at $500,540; "that said assessment * * * was an erroneous and mistaken assessment by reason of the fact that the aforesaid county assessor did erroneously and mistakenly believe that the sole and only rent being paid for the use of the aforesaid premises * * * was the sum of $100.00 per annum * * *; that said rental of $100.00 per annum, instead of the true and correct rental of $557,327.67, was, through inadvertence, error and mistake of said assessor, used in the aforesaid calculation of the assessed value of the aforesaid possessory interests; that had it not been for the aforesaid inadvertence, error and mistake of said assessor in so assuming erroneously and mistakenly the rental paid * * * was the sum of $100.00, instead of the correct figure of $557,327.67, there would have been no assessment of any sum at all * * * as it was the custom and practice of said assessor to make no assessment whatsoever, regardless of the ownership, right, title or interest under said harbor orders, where the computed proper rental and/or six per cent return on the restricted fee interest of the property was less than the amount of rental paid by such lessee to the Board of Harbor Commissioners of the City of Los Angeles." The complaint further sets forth the alleged valuation procedure followed by the assessor, i. e., a valuation of the lands covered by the lease at $1,456,310; a computation of the proper rental return at 6 per cent., to wit, $87,386; the deduction from the latter figure of $100 rental paid by plaintiff, leaving $87,278.60 (the pleader's figures) as the net annual worth of the lease to the lessee; and the capitalization of that balance for the remainder of the life of the lease as giving the assessed value of the leasehold interest. It is further alleged "that the assessed valuation of the aforesaid possessory interests * * * on the basis of the actual rent paid by said company in the sum of $557,327.67, as applied to the proper return thereon, as found by said assessor * * * of the sum of $87,386.60, left a negative annual interest in said Los Angeles Lumber Products Company under and by virtue of said possessory interests of $469,941.07" and "that by reason of the lack of any interest under the assessor's method of computing the same, no assessment and/or tax thereon was due or proper in any sum or at all."

It is respondent's contention that the allegations of the complaint show a mere case of overvaluation by the assessor, and, since there is no allegation of any appeal to the county board of equalization for relief (Southern California Hardwood, etc., Co. v. County of Los Angeles, 49 Cal.App. 712, 194 P. 62; Luce v. City of San Diego, 198 Cal. 405, 245 P. 196), appellant cannot recover.

Appellant claims to be entitled to recover under Political Code, § 3804, on four separate grounds: (1) That the assessment was in excess of the actual cash value of the property by reason of a clerical error of the assessor [Orpheum Circuit, Inc., v. County of Los Angeles, 12 Cal.App.(2d) 257, 55 P.(2d) 901; Associated Oil Co. v. County of Orange, 4 Cal.App.(2d) 5, 40 P.(2d)

887]; (2) that the tax was in effect a tax on nonexistent property [Pacific Coast Company v. Wells, 134 Cal. 471, 66 P. 657; Associated Oil Co. v. County of Orange, supra]; (3) that the tax was really laid on the exempt city property since the lease had no taxable value [Brenner v. City of Los Angeles, 160 Cal. 72, 116 P. 397]; (4) that since the power of the assessor under Political Code, § 3627, is restricted to the assessment of property at its full cash value, the assessment of this property in excess of its full cash value is illegal and recoverable under Political Code, § 3804.

[1, 2] Appellant also urges preliminarily that "in the absence of statute authorizing it to do so, a Board of Equalization has no power to cancel or strike out an assessment under any circumstances, and any order to that effect is a nullity" (24 Cal.Jur. p. 235, and cases cited), and hence, since its property had no taxable value, the board of equalization would have been powerless to give it relief. This argument is more ingenious than persuasive. Herein must be observed the distinction between property not properly the subject of taxation, and property which is of a character properly subject to taxation but without taxable value. If the property placed on the assessment roll is not subject to taxation in any event, e. g., exempt, out of the jurisdiction, etc., the attempted assessment is a nullity. If the property is the proper subject of taxation, as here, but not taxable because it possesses no taxable value, an appeal to the board of equalization would still lie even though the board might reduce its assessed value to zero. The question would still be, "What is the taxable value?" and not, "Is the property of a class which is not subject to taxation?"

[3] It should not be forgotten that the requirement of appeal to the board of equalization in cases of overvaluation in assessments for tax purposes is grounded in an important public policy. In fixing the tax rate, the board of supervisors must perform a mathematical calculation in which the sum of the estimated expenditures for the ensuing fiscal year is applied to the total assessed valuation of the taxable property. If the latter figure becomes a variable, the possible confusion in the fiscal affairs of the county will be incalculable. In view of this fact, the courts should be, as they have been, slow to extend the cases in which recourse to the board of equalization is not made a prerequisite to the recovery of taxes paid.

[4, 5] We return to the 4 main arguments of appellant.

In support of its claim that the assessment was due to a clerical error of the assessor, appellant must rely on the following allegation of its complaint: "That the aforesaid county assessor did erroneously and mistakenly believe that the sole and only rent being paid for the use of the aforesaid premises by said Los Angeles Lumber Products Company was the sum of $100.00 per annum." This does not amount to an allegation of a clerical error.

"A clerical error exists when without evident intention one word is written for another * * * a mistake in copying or writing * * * a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination." 11 Cor.Jur. p. 839; Kuhlemeier v. County of Los Angeles, 2 Cal.(2d) 257, 261, 262, 40 P.(2d) 828; Leonis v. Leffingwell, 126 Cal. 369, 372, 58 P. 940.

If the assessor had intended to use the figure $557,427.67 and through inadvertence had used $100 instead, that would be a clerical error. But under the allegations of this complaint, his use of the figure $100 was intentional and not inadvertent.

The cases cited by appellant on this point are not apposite to the facts alleged in the complaint. In Orpheum Circuit, Inc., v. County of Los Angeles, supra, the assessor made an error in computation, a purely mechanical operation. Pacific Coast Company v. Wells, supra, was decided before the "clerical error" provision was added to section 3804, but as pointed out in Kuhlemeier v. County of Los Angeles, supra, 2 Cal.(2d) 257, at page 262, 40 P.(2d) 828, 830, "even had the Code section then provided for a refund based on a 'clerical error' of the assessor, the cited case, * * * clearly presented a situation wherein a 'clerical error' had occurred by reason of plaintiff's bookkeeper inadvertently using the figure $323,776.51 when he intended $223,776.51, which clerical error was copied and adopted by the assessor in fixing the assessment." The same observation applies to Associated Oil Co. v. County of Orange, supra, where plaintiff inadvertently furnished the assessor with a statement showing 486,096 barrels of oil produced on its leased property instead of 126,132, which clerical error the assessor adopted and copied into his record.

[6-9] Appellant's claim that the assessment was on nonexistent property is grounded on the assertion that property without taxable value is nonexistent for tax purposes. Appellant cites many cases to the effect that the basis of taxation is not the property but its value. This is a truism which may be readily conceded. But it does not follow that if the property belongs to a class which is subject to taxation, it is nonexistent property because under the peculiar circumstances existing it is without taxable value. Leases from the state and its political subdivisions form a class of property which is taxable. This lease is owned by appellant, it is property, and it falls within a taxable class. The assessor erroneously, under the pleading, assessed it at $500,540 when he should have assessed it at zero. In our judgment, this constituted an overassessment of existing property and not an assessment of nonexistent property.

The cases relied on by appellant are readily distinguishable. In Pacific Coast Company v. Wells, supra, the assessor assessed $100,000 in solvent credits that did not exist. In Associated Oil Co. v. County of Orange, supra, in practical effect he assessed 300,000 barrels of oil that did not exist. In our case he assessed a leasehold interest that did exist and was owned by appellant.

[10] The claim that the tax was really laid on the city's exempt fee in the property is equally untenable. The assessor undertook to assess the leasehold interest, not the fee. According to the complaint, he miscalculated the value of the leasehold interest. But that miscalculation was not the result of any erroneous attempt to assess the fee as such, nor of any failure on the part of the assessor to calculate the value of the fee separately and exclude it from the value of the leasehold interest. His method of computation, the formula used, was concededly proper, but the result is claimed to be erroneous because one of the figures used in his calculation was incorrect. The case is not at all similar to Brenner v. City of Los Angeles, supra, where the assessor failed to deduct from the value of plaintiff's property a mortgage held by the state and thereby assessed to plaintiff the value of the mortgage.

[11] The final claim that under Political Code, § 3627, an assessment in excess of the full cash value of the property is independently recoverable finds no support in any California case. It remains a case of overvaluation, and, under the settled rule, cannot be recovered in the absence of recourse to the board of equalization.

Judgment affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

22 Cal.App.2d 351

LEE v. DE FOREST.

Civ. 11318.

District Court of Appeal, Second District, Division 1, California.

Aug. 19, 1937.

Rehearing Denied Sept. 16, 1937.

1. Landlord and tenant 🔑133(2)

Where housekeeper changed all locks on premises leased by lessee and excluded him therefrom, lessor was under no obligation to restore lessee to possession.

2. Landlord and tenant 🔑190(1)

Lessee excluded from leased premises by his housekeeper could not set up such eviction as defense in lessor's action for rent, since eviction as defense or cause of action of lessee against lessor must be shown to have been by act of lessor or through his procurement, or by paramount title.

3. Landlord and tenant 🔑230(1)

Where lessor alleged refusal to release lessee from lease and lessee's agreement that lessor might, pursuant to terms of lease, take possession and relet premises for benefit of lessee and that at no time was there any agreement whereby lessee was to be released from payment of rent under lease, action was on lessee's liability to pay rent and not on liability for damages.

4. Landlord and tenant 🔑198

Where lease provided that in event of re-entry or termination lessee should pay deficiency after reletting on specified rent days, lessor could not claim that he had option to sue for deficiencies as they accumulated or sue for damages at end of term, since when parties by their contract provide for consequences of breach, lay down a rule to admeasure damages, and agree when they are to be paid, remedy thus provided must be exclusively followed.

5. Limitation of actions 🔑51(2)

Where action for rent under three-year lease made in 1929, which provided that in event of re-entry or termination lessee should be liable for rent until lease would have expired and that lessee should pay deficiency after reletting on several rent days specified, was commenced in 1936, action as to deficiencies accruing four years prior to commencement of action was barred by four-year statute of limitations (Code Civ.Proc. § 337, as amended by St.1935, p. 1740).

6. Limitation of actions 🔑51(2)

Generally, an action to recover any unpaid installment on installment contract must be brought within the period of limitations after the particular installment becomes payable under the contract (Code Civ. Proc. § 337, as amended by St.1935, p. 1740).

7. Limitation of actions 🔑46(1)

Provisions of express contract and not entries in book account control running of statute of limitations (Code Civ.Proc. § 337, as amended by St.1935, p. 1740).

8. Account, action on 🔑2

The expression "outstanding and open account" in legal and commercial transactions is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment and usually disclosed by account books of the owner of the demand and does not include express contracts or obligations which have been reduced to writing such as bonds, bills of exchange, or notes.

[Ed. Note.—For other definitions of "Open Account" and "Outstanding Accounts," see Words & Phrases.]

9. Limitation of actions 🔑53(2)

Where lessor's right of action based on terms of lease providing that lessee should pay deficiency after reletting on specified rent days was barred by statute of limitations as to those portions accruing more than four years prior to commencement of action, lessor could not recover on book account composed of charges accruing under lease since alleged book account did not fix new date for running of statute of limitations (Code Civ.Proc. § 337, as amended by St.1935, p. 1740).

10. Judgment 🔑85

In action for rent under lease, where part of claim was barred by limitations and lessee's affidavit in opposition to lessor's motion for summary judgment failed to set forth facts sufficient to entitle him to defend, statute relating to judgment in case of partial defense was applicable (Code Civ. Proc. § 437c, as added by St.1933, p. 1848).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by E. Lee against Lee DeForest. Summary judgment for the plaintiff, and defendant appeals.

Reversed and remanded.

Perry F. Backus, of Los Angeles, for appellant.

A. A. Rotberg, of Los Angeles, for respondent.

PER CURIAM.

From a summary judgment that was rendered against him under section 437c of the Code of Civil Procedure, as added by St.1933, p. 1848, which provides that when an answer is filed in an action to recover upon a debt or upon a liquidated demand upon motion of the plaintiff, supported by affidavit, such answer may be stricken out and judgment may be entered in the discretion of the court, unless the defendant shall show by affidavit "such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend," defendant has appealed to this court.

By the terms of a lease entered into between defendant and the plaintiff's assignor (hereinafter referred to as the lessor), the latter let to defendant an apartment in the city of New York for a term of three years from and after October 1, 1929, for a total rent of $15,000, payable in installments of $416.67 in advance on the first day of each month. The amended complaint upon which the judgment is based contains the allegation that the rent which had accrued on March 1, 1930, and thereafter, was not paid; also, that there had accrued as additional rent (pursuant to an agreement therefor in the lease) during the year 1930, certain charges for electric current, maid service, laundry service, and window cleaning; that on or about August 30, 1930, "defendant abandoned said premises and refused and neglected to pay any further rent under said lease"; that the lessor "thereupon notified said defendant that it would not release him from said lease, and said defendant thereafter agreed that said * * * (lessor) * * * may, pursuant to the terms and conditions of said lease, take possession of the demised premises for the benefit of and as agent of said defendant, rent the premises for the best rent obtainable therefor, and hold said defendant liable for any deficiency * * *"; that thereafter the lessor rented the premises at a lesser rental then that provided in the lease and credited the defendant therewith; that defendant paid certain sums on account of said obligation; that there is now due and owing from defendant $7,498.44, with interest from September 30, 1932. By a second cause of action, plaintiff alleged that defendant was indebted to its assignor upon an "open book account" for said sum.

In the affidavit filed by him in opposition to plaintiff's motion for summary judgment, defendant failed to set forth facts to substantiate the assertions contained in his answer either of an "eviction" from the premises, or of an alleged agreement with the lessor whereby defendant's liability under the lease was terminated upon his surrender of the premises. He did not state therein that plaintiff's assignor agreed to release him from his liability, but alleged that "this defendant requested a cancellation of the said lease and requested the right to deliver up possession for the reason that this defendant's housekeeper had changed all of the locks on said premises covered by the lease and excluded this defendant therefrom * * * plaintiff's assignor agreed to take possession of said premises on or about the 1st day of September, 1930. * * *" Defendant also denied that he promised to pay any rent after September 1, 1930, and denied that he requested the lessor to relet the premises for his benefit. These denials are meaningless, for, as hereinafter appears, upon surrender of the premises, the lessor legally had the right to and did relet for defendant's benefit. Moreover, by his affidavit, defendant admitted that he had written a letter to the lessor's agent, a copy of which was set forth in plaintiff's affidavit, and which was in part as follows:

"I have not been able to occupy my apartment since last March. I expect to move shortly to California and I wish therefore that you would proceed immediately to take over my apartment through dispossess proceedings, if necessary, and do your best to re-lease it either furnished or unfurnished, as you see fit. * * * This action on your part will help to reduce my indebtedness to you and I will appreciate it very much."

[1, 2] The alleged "eviction" of defendant by his "housekeeper" placed the lessor under no obligation to restore him to possession. It is elementary that an "eviction" as a defense or cause of action of a tenant against a landlord must be shown to have been by the act of the landlord or through his procurement, or by paramount title. 16 R.C.L. 684 et seq.; 16 Cal.Jur. 679.

Defendant also contended that the statement of the amount due from him was incorrect, asserting that he had "canceled checks for $1941.12." An examination of the account annexed to the affidavit of plaintiff's assignor shows that defendant was given credit for the payments represented by said checks.

It is clear that, as far as these attempted defenses were concerned, the conclusion that defendant had failed to set forth facts "sufficient to entitle him to defend" was justified; and in the absence of any other defense, the order of the trial court striking the answer and entering judgment for plaintiff would have been correct. The instant action, however, was commenced on June 11, 1936, and at all stages of the proceeding defendant pleaded the bar of the statute of limitations (section 337, Code Civ.Proc., as amended by St.1935, p. 1740) as to all of the claim except that portion thereof which represented the default in payment of rent for the months of July, August, and September, 1932. In this connection, appellant states in his brief, "It is admitted by the defendant that if plaintiff could recover at all it should be for $1240.01 and interest from July 1st, 1932, on $416.67; on the same amount from August 1st, 1932, and a like amount from September 1st, 1932, to the date of filing said complaint. The defendant is willing to allow judgment to be rendered for that amount." In making this statement, appellant has overlooked, presumably through inadvertence, the fact that he is entitled to a credit of $750 for the proceeds of the reletting of the premises for the months of July, August, and September, 1932.

It appears from appellant's brief that he relies upon the proposition that a cause of action accrued each month during the term of the lease for the deficiency in rent which resulted from the reletting for that month, and that an action therefor, commenced more than four years after such accrual, is barred by the provisions of section 337 of the Code of Civil Procedure. As to this point, respondent seeks to sustain the judgment by reference to the authorities which hold that a landlord's action for damages, after the tenant's repudiation of the lease and abandonment of the premises (which will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease), may not be brought prior to the expiration of the term of the original lease, at which time the damages for the first time can be ascertained. Treff v. Gulko, 214 Cal. 591, 592, 7 P.(2d) 697; Bradbury v. Higginson, 162 Cal. 602, 123 P. 797; Hermitage Co. v. Levine, 248 N.Y. 333, 162 N.E. 97, 59 A.L.R. 1015. The difficulty with upholding respondent's contention in the present case, however, is that the lease here sued upon, a copy of which was attached to the amended complaint, contains the following provision:

"In the event of re-entry or of termination of this lease by summary proceedings or otherwise, whether or not the premises be re-let, the tenant shall remain liable until the time when this lease would have expired, but for such termination, for the equivalent of the amount of all of the rent reserved herein, less the avails of re-letting, if any, and the same shall be due and payable by the tenant to the landlord on the several rent days above specified, that is, upon each of such rent days the tenant shall pay to the landlord the amount of the deficiency then existing."

In Hermitage Co. v. Levine, 248 N.Y. 333, 162 N.E. 97, 98, 59 A.L.R. 1015, it was said:

"No doubt a damage clause can be drawn in such a way as to make a tenant responsible for monthly deficits after the re-entry of his landlord, and this without charging the landlord with a duty to account for a surplus in other seasons. Such a clause will be found in McCready v. Lindenborn, 172 N.Y. 400, 65 N.E. 208, where the lease was to the effect that the tenant would pay the difference in rent 'in equal monthly payments as the amount of such difference shall from time to time be ascertained.' A clause similar in effect, though more uncertain in its terms, will be found in Mann v. Ferdinand Munch Brewery, 225 N.Y. 189, 121 N.E. 746, where the tenant was to 'continue liable for the payment of the rent and the performance of all of the other conditions herein contained.'"

In the case of Phillips-Hollman v. Peerless Stages, 210 Cal. 253, 291 P, 178, 180, in part, it was said:

"Ordinarily the reletting of the premises amounts to an election to terminate the lease and to hold the tenant for damages, and in such case, as we have seen under the authorities, supra, the action cannot be successfully maintained until the termination of the original term. The lease, however, may be so drawn as to contain provisions by which the application of that rule may be evaded."

In the same opinion, after discussing the case of Hermitage Co. v. Levine, 248 N.Y. 333, 162 N.E. 97, 59 A.L.R. 1015, and the authorities therein referred to the court said:

"In Kottler v. New York Bargain House, Inc., 242 N.Y. 28, 150 N.E. 591, * * * the covenant which was held to take the case out of the general rule above set forth was to the effect that "if the said premises * * * became vacant during the said term, the landlord or his representatives may re-enter the same * * * and re-let the said premises as the agents of the said tenants, and receive the rent thereof; applying the same, first, to the payment of such expenses as they may be put to in re-entering, and then to the payment of the rent due by these presents; the balance, if any, to be paid over to the tenants, who shall remain liable for any deficiency.' It was held that the liability for rent continued after the taking of possession and reletting by the landlord, under this covenant, and that an action could be maintained for such accrued deficiency before the end of the term. In the lease under consideration several clauses are found which indicate the foregoing intent very much more strongly than the phrase used in the Brewery Case, supra, or the covenant in the Kottler Case, supra; in fact, it would appear that the parties to the present lease had the rule illustrated by the Loydon [Oliver v. Loydon, 163 Cal. 124, 124 P. 731,] Bradbury, and Hermitage Cases in mind, and so drew the lease as to evade the application of the principle set forth in the earlier cases above cited."

The court then quoted from the lease provisions to the effect that should the lessees abandon the premises and the lessor take possession, "notwithstanding the same the said lessees shall not be released from liability for the full rental herein called for"; that the lessor may relet and the lessees shall be liable "for the balance of the full term hereof, for the difference between the said rental procured by said lessor and the rental herein called for"; that default in payment of rent shall, at the option of the lessor, "work a termination of this lease to the same extent and with all the legal incidents as if the term hereof had expired by efflux of time." The court then continued:

"These clauses clearly show an intent that, at the option of the lessor, he could keep the liability of the tenant to pay rent alive (as distinguished from the liability to pay damages) even though the landlord had taken possession of the premises and relet the same. * * * The test applied in each of these cases is whether the parties show by their language that they intended, even though the tenant abandons the premises and the landlord relets them, to keep the liability to pay rent alive, as distinguished from the ordinary liability to pay damages. If such an intent appears the landlord may sue for the difference between the reletting price and the original lease price as each installment accrues, even though the entire lease period has not expired."

[3] So in the instant case, the action is upon the defendant's liability to pay rent. The plaintiff alleges the lessor's refusal to release defendant from the lease and defendant's agreement that the lessor might "pursuant to the terms and conditions of said lease," take possession of the premises and relet the same for his benefit. The affidavit of the lessor's agent, filed in support of the motion for judgment, states: "That at no time was there an agreement * * * whereby the defendant was to be released from the further payment of rental under said lease. * * * He agreed that said premises be rerented for his benefit in accordance with the terms and conditions of said lease. * * *"

[4] Respondent contends that a distinction should be made by reason of the fact that the parties agreed upon a sum which represented the total rent for the term, the provision for monthly payments being for the convenience of the lessee. However, that may be, the provision that the tenant shall pay the deficiency after reletting "on the several rent days above specified" obviously is for the convenience of the lessor and plainly was inserted to avoid the effect of the very rule of law which respondent seeks to have applied. Nor can it be argued that the lessor had the option either to sue for the deficiencies as they accumulated, or to wait until the end of the term and sue for damages, since the allegations of the complaint and the affidavit in support of the motion for judgment plainly show that the entry and reletting were pursuant to the provision of the lease hereinbefore quoted. "When the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages, and agree when they are to be paid, the remedy thus provided must be exclusively followed." McCready v. Lindenborn, 172 N.Y. 400, 65 N.E. 208, 211.

[5] Since we hold that by plaintiff's own showing upon his motion for summary judgment, his action was barred except as to the claim for the deficiencies in rent which accrued within four years prior to the commencement of the action, it becomes necessary to determine whether or not the judgment may be supported under plaintiff's second cause of action, which contained, in substance, merely the bare allegation that defendant was indebted to plaintiff's assignor upon "an open book account, for rent." It appears that the lessor kept a ledger record of the charges against defendant for rent (and, after the surrender of the premises, of the credits due defendant for the "avails of reletting"). Also included in such record were charges for "maid service," "electricity," "laundry," and "window cleaning." The date of the last entry of the latter items is September, 1930. It is clear that these "service charges," considered as a separate book account, are barred; but respondent's position appears to be that these items properly formed the basis of a book account; that by the terms of the lease they were to be payable as "additional rent"; that these items and all other charges against the lessee were entered in one account, the last entry therein being a charge for rent and a credit for the proceeds of reletting for the month of September, 1932; and that the period of limitations should be computed from the date of said last entry.

[6, 7] We think that plaintiff's attempt to recover by alleging an open book account when his right of action is based upon the terms of an express contract ought not to be allowed. It may be noted, in this connection, that the second cause of action was not included in plaintiff's first complaint, but was added by amendment after defendant had set up the defense of the statute of limitations. As to installment contracts generally, the weight of authority is to the effect that an action to recover any unpaid installment must be brought within the period of limitations after the particular installment becomes payable under the contract. 82 A.L.R. 316; Bissell v. Forbes, 1 Cal.App. 606, 82 P. 698; People v. California Safe Deposit & Trust Co., 41 Cal.App. 727, 183 P. 289; Vatcher v. Grier, 50 Cal.App. 39, 195 P. 75; Mason v. New York, 28 Hun (N.Y.) 115. It also has been held that the provisions of an express contract, and not the entries in on account kept by plaintiff, control the running of the statute. In Connor Livestock Co. v. Fisher, 32 Ariz. 80, 255 P. 996, 998, 57 A.L.R. 196, the plaintiff, who had sued to recover unpaid rent under three oral leases, sought to avoid the effect of the statute of limitations which had been set up by the defendant by including his claim for rent in an "open account" for money theretofore advanced. The Arizona Civil Code of 1913, par. 711, subd. 2, provided that "actions upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant" shall be barred within three years after the incurrence of the last item of indebtedness therein entered. It was there said, in part:

"An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is not, as a rule, an open account. * * * Were the only basis of plaintiff's action the rent due on the three oral leases, we do not think it could be successfully contended that it constituted an 'open account'. The amount of rent due and the time of payment under the leases was fixed, and the fact that the tenant was at times behind in his rent, or that the leases might be terminated at any time on notice, do not, we think, affect the character of the contracts. We have been cited to no authority holding a contract of this nature creates an open account. Appellee refers to two Vermont cases, but in that state there is a special statute allowing an action of what is called 'book account,' and the Vermont cases * * * hold * * * that under some particular circumstances rent may be recovered in the statutory action.

"It will be urged by plaintiff, however, that the other two classes of items bring the whole matter within the definition of an open account. It may be that there are circumstances under which an item not ordinarily included in an open account may be placed there in the ordinary course of business, but we think this case is not one of that nature. It savors to us rather of an attempt to avoid the statute of limitations by, as an afterthought, arbitrarily including matters not properly or originally considered by either party as an open account, under that head, in order to avoid the statute. We do not think the items of rent constitute either an open account or any part thereof, and the plea of the statute of limitations was therefore available to defendant as against all such items due and payable before January 15, 1922."

In the case of Stewart v. Claudius (Cal. App.) 65 P.(2d) 933, 935, it was held that in an action to recover installments due under a written contract, "the provisions of the contract are controlling as to the running of the statute; and even though the plaintiff keeps a memorandum book in which he charges the accounts accruing under the contract and credits therein the several payments made, the entries in the book account do not fix a new date for the running of the statute." And in People v. California Safe Deposit & Trust Co. (People v. Magee), 41 Cal.App. 727, 183 P. 289, 291, in holding that a right of action for the payment of money in installments pursuant to the terms of a contract was barred, the court declared:

[8] "Appellant further contends that his cause of action is based upon a book account, in which the last entry was made on July 7, 1917, and therefore his cause of action is not barred. The alleged book account was a memorandum kept by appellant, in which he charged the amounts accruing under the contract and credited the several payments made, including that collected by him as the result of the judgment in the former suit above referred to. Appellant's alleged cause of action is based upon his contract and not upon this account. The writing is a mere memorandum of debts accruing from an entirely independent source. In Mercantile Trust Co.

v. Doe, 26 Cal.App. 246, 253, 146 P. 692, a number of definitions of a book account as applied to the statute of limitations, are given, among which is the following: 'In 1 Ruling Case Law, page 207, it is said: "The expression 'outstanding and open account' has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes."' Under the facts of this case, the alleged book account is not such a one as fixes a new date for the running of the statute of limitations."

[9] It may be observed that the facts shown by plaintiff in support of his motion did not include any agreement or understanding between the parties that the determination of defendant's liability under the lease was to be kept open until the end of the term. To the contrary, as has been noted, it was alleged that the surrender and re-entry were pursuant to the terms of the lease, which provided that the tenant should pay the deficiency in rent for each month as it accrued. In our opinion, the showing made by plaintiff was insufficient to support a judgment upon his second cause of action.

[10] Since no sufficient defense was made to that portion of plaintiff's claim which represented the deficiency in rent for the months of July, August, and September, 1932, the provisions of the last paragraph of section 437c of the Code of Civil Procedure are applicable. That paragraph is as follows: "If it appear that such defense applies only to a part of the plaintiff's claim, or that any part is admitted, the court shall, by order, so declare, and plaintiff's claim shall be deemed established as to so much thereof as such defense shall not apply to, or as is admitted, and the cause of action may be severed accordingly, and the action may proceed as to the remainder of such claim. No judgment shall be entered prior to the termination of such action but the judgment in such action shall, in addition to any matters determined in such action, award to plaintiff the amount of his claim so established by the proceedings herein provided for."

The judgment is reversed and the cause remanded, with directions to the court below to proceed pursuant to the provisions of section 437c of the Code of Civil Procedure and in conformity with the views herein expressed.

---

22 Cal.App.2d 411

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. McLAUGHLIN et al.*

Civ. 10370.

District Court of Appeal, First District,
Division 1, California.

Aug. 25, 1937.

Hearing Denied by Supreme Court
Oct. 21, 1937.

1. Judgment 🔑713(2)

The judgment of court of competent jurisdiction upon the merits concludes parties and their privies, not only upon questions actually decided and determined, but upon all matters which might have been litigated and decided, and bars a new suit involving same cause of action.

2. Judgment 🔑585(5)

A change of facts occurring after rendition of judgment will not affect estoppel resulting from such judgment if no new element is introduced and legal rights and relations of parties remain as before.

3. Judgment 🔑585(5)

Where occupants of building obtained judgment in their favor in owner's suit against them for restitution of realty, on ground that they had a valid lease thereof, owner's subsequent service of notices to quit created no change in legal rights and relations of parties and hence did not affect standing of such judgment as res judicata.

4. Appeal and error 🔑878(3)

Where defendants appealed from adverse judgment, plaintiff who did not appeal could not question correctness of trial court's admission of evidence offered by defendants.

5. Judgment 🔑540

A former judgment may be pleaded in bar where suit is upon same cause of action.

---

*Hearing denied by Supreme Court 72 P.(2d) 554.

and effect thereof is much greater than plea of former judgment by way of estoppel, since it is a complete bar to second suit regardless of what was presented in support or defense of claim in prior suit.

6. Judgment ⟹634, 956(1)

Though plea of estoppel by judgment, unlike plea of judgment in bar, is available in subsequent suit upon different cause of action as to any issue adjudicated in former action, it must be shown either by record or by extrinsic evidence that identical question involved in subsequent suit was determined in former action.

7. Judgment ⟹956(5)

Where owner of building twice sued occupants thereof for restitution of realty, and occupants who claimed under oral lease obtained judgment on verdict in first suit and pleaded res judicata in second suit, testimony of jurors who acted in first suit *held* to establish that jury found in first suit that owner had given occupants an oral lease and hence that judgment for defendants in first suit was res judicata as to same defense in second suit.

◆

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Judge.

Action by the Bank of America National Trust & Savings Association against Patrick McLaughlin and others. From a judgment for plaintiff, defendants appeal.

Reversed and remanded with directions.

Wyckoff, Gardner & Parker, of Watsonville, and Garth V. Lacey, of Salinas, for appellants.

Keyes & Erskine, of San Francisco, and Rosendale, Scott & Thomas, of Salinas, for respondent.

PER CURIAM.

This is an appeal by defendants from a judgment in favor of the plaintiff, adjudging to it restitution of certain real property in the possession of certain of the defendants, the action being one in unlawful detainer. The plaintiff was also awarded damages for its detention.

The defendants make several contentions in support of their appeal; but in view of the conclusion we have reached upon one of them, namely, that the present action is barred by a previous adjudication between the parties, it will be unnecessary to consider the others.

The plaintiff averred in its complaint that it was the owner of the premises and entitled to their immediate possession; that the tenancy of the defendants had expired; that a 30-day notice to quit had been served upon them without result, followed by one of 3 days, which proved equally fruitless.

By their answer, supplemental answer, and amended and supplemental answer, the defendants denied that the plaintiff was the owner or entitled to the possession of the premises; and averred that their possession and occupancy was and had been under a 7-year oral lease entered into between plaintiff and defendants on December 1, 1931. In a separate defense, they proceeded to amplify this averment and show that they were formerly the owners of the real property, and had borrowed from the plaintiff a sum of money secured by a deed of trust thereon; that they being in default in the payment of their indebtedness, the plaintiff proceeded under the provisions of the deed to sell the premises; that it bought them in at the sale, and, in due course, received a deed therefor from the trustee; that during the pendency of the proceedings for said sale, the plaintiff, for a valuable consideration, entered into an oral agreement with said defendants, by which it leased to them the premises for a period of 7 years, with the understanding that the terms thereof would in due course be reduced to writing; that under and by virtue thereof said defendants remained in possession and proceeded to farm the land and carry out in all respects the terms of the lease; that the plaintiff subsequently failed and refused to execute the promised written lease, but that it is estopped to set up that provision of the statute of frauds making a lease of land for a longer period than 1 year invalid in the absence of a memorandum thereof signed by the party to be charged; that the plaintiff had, prior to the commencement of the present suit, brought a similar action in unlawful detainer against the defendants, in which it set up the same title and right to possession which are here pleaded; that the defendants in their answer thereto made precisely the same defense as they here advance; that a trial thereon was duly had before a jury, which rendered a verdict in their favor; and that judgment thereon was entered, which judgment, it is averred, "has become final and that it constitutes a bar to and estops plaintiff from prosecuting this action."

The present suit was tried before the court, which filed written findings of fact; and it is therein found that the defendants pleaded in the former action that they were tenants of the plaintiff under the alleged lease in practically, if not precisely, the same language as in the present one.

We are not here concerned with the question whether the verdict of the jury in the former action was correct. If the same evidence, or evidence substantially the same, was presented therein as in the trial of the present suit, we are inclined to doubt it if thereby they intended to determine that the lease was valid for more than 1 year; but that question is foreclosed by the judgment therein entered.

[1] The principle invoked by the defendants that the former judgment is a bar to the present action is thus stated in the article on Judgments in volume 34 Corpus Juris, § 1154, page 743: "The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and their privies to the litigation, and constitutes a bar to a new action or suit involving the same cause of action, either before the same or any other tribunal;" and among the many decisions cited in support of the doctrine thus formulated are the following from the Supreme Court of this state: Krzepicki v. Krzepicki, 167 Cal. 449, 140 P. 13; South San Bernardino Land & Imp. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 P. 699; Keech v. Beatty, 127 Cal. 177, 59 P. 837; Chase v. Swain, 9 Cal. 130, followed by decisions of this court in Leaver v. Smith, 47 Cal.App. 474, 190 P. 1050; O'Brien v. Reardon, 29 Cal.App. 703, 155 P. 534.

The principle goes even farther. "The rule is often stated in general terms that a judgment is conclusive not only upon the questions actually decided and determined but upon all matters which might have been litigated and decided in that suit." 34 Cor.Jur., Judgments, § 1322, p. 909, citing the following cases from this jurisdiction: Reynolds v. Churchill Co., 187 Cal. 543, 202 P. 865; Conner v. Bakersfield Bank, 183 Cal. 199, 190 P. 801; Erving v. Jas. H. Goodman & Co. Bank, 171 Cal. 559, 153 P. 945; Allen v. Allen, 159 Cal. 197, 113 P. 160; In re Bell's Estate, 153 Cal. 331, 95 P. 372; Crew v. Pratt, 119 Cal. 139, 51 P. 38, and others.

It is said that the rule is founded upon 2 considerations. One, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation; the other, the hardship on the individual that he should be vexed twice for the same cause. "The doctrine treats the final determination of the action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, and such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided." Id., § 1154, p. 743 ; Giuffre v. Lauricella, 25 Cal.App. 422, 143 P. 1061.

The record in the present case establishes that the plaintiff's cause of action against the defendants is precisely the same in each suit, namely, the right to immediate possession of the land involved by virtue of its ownership thereof; and that the same defenses are set up by the defendants in their answer in each suit, namely, first, denial of such ownership, and, second, the right on their part to possession by virtue of a 7-year oral lease the invalidity of which the plaintiff is estopped to assert, the facts and circumstances creating such estoppel being set forth.

[2, 3] The respondent calls attention to a limitation of this rule of res judicata, namely, that it extends only to the facts and conditions as they existed at the time the judgment was rendered, or more correctly speaking, at the time the issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment; and when new facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and hence the former judgment cannot be pleaded in bar of the second action. 34 Cor.Jur., Judgments, § 1228, p. 808. But the change of facts will not affect the estoppel if no new element is introduced, and the legal rights and relations of the parties remain as before. Id., p. 810; Montgomery v. Harrington, 58 Cal. 270; Young v. Kauf-

man, 172 Cal. 546, 157 P. 1007. The only new fact suggested by the respondent as appearing in the second suit is the service subsequent to the determination of the first of the 30-day and 3-day notices to quit heretofore referred to. However, the service of these notices created no change in the legal rights and relations of the parties. The plaintiff thereby merely sought to ignore the effect of the judgment obtained by the defendants, and, without any allegations that the tenancy adjudicated thereby had for any legal reason been terminated or the terms thereof breached by the defendants, treat them as not possessed of those rights secured to them by that judgment. The service of these notices was based upon the theory entertained by the plaintiff that the defendants were mere tenants at will because occupying, as it claims, under an invalid lease—the precise claim decided against it in the former suit.

[4] In the trial of the present action the court admitted evidence for the purpose of proving that the jury in the first suit by its general verdict actually found that the 7-year oral lease was valid and that the plaintiff was estopped to plead its invalidity because not in writing. This evidence was admitted against the plaintiff's objection. It here contends that the ruling was erroneous; but this not being the respondent's appeal, it is not in a position to question the correctness of the ruling. Estate of Olmsted, 122 Cal. 224, 54 P. 745.

[5, 6] It is perhaps necessary here to point out the distinction between the effect of pleading a former judgment in bar, and pleading it by way of estoppel. The first plea is available where the suit is upon the same cause of action; and its effect is much more extensive than the plea of estoppel, since it is a complete bar to the second action regardless of what may or may not have been presented in support or defense of the claim in the prior action (Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Erving v. Jas. H. Goodman & Co. Bank, supra; Wheeler v. Eldred, 137 Cal. 37, 69 P. 619; Wolverton v. Baker, 98 Cal. 628, 33 P. 731); whereas to support a plea of estoppel by judgment, while it is available in a subsequent suit upon a different cause of action as to any particular fact there in issue which was adjudicated in the first action (Horton v. Goodenough, supra; Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73; Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 P. 1108; 15 Cal.Jur., Judgments § 189, p. 136); it must be made to appear either upon the face of the record or by extrinsic evidence that the identical question involved in the issue to be tried was determined in the former action (Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 79 Am.St.Rep. 118; People v. Bailey, 30 Cal.App. 581, 158 P. 1036; Reed v. Cross, 116 Cal. 473, 48 P. 491; In re Clark's Estate, 190 Cal. 354, 212 P. 622; Green v. Thornton, 130 Cal. 482, 62 P. 750).

[7] The evidence above adverted to being admitted, it showed that the verdict of the jury in the former case was in fact based upon a finding by them that the 7-year oral lease was valid by reason of the facts pleaded and proved therein as an estoppel. This evidence consisted of the testimony of 9 of the jurors who participated in the first trial—the other 3 not being called because unavailable. These jurors were rather hazy about the issues submitted to them on that trial, but they were clear and positive about one thing, which was that the defendants had surrendered at the request of the plaintiff valuable rights upon its assurance that they would be given a written lease for a term of 7 years of the premises here involved. This evidence left no doubt that the jury determined this issue in defendants' favor. That period had not yet expired when the present action was commenced; and we see no escape from the conclusion that whether or not the first judgment was a correct determination of the rights of the parties, they are all, in view of its finality, equally bound by it.

We conclude that the finding of the trial court against the plea in bar was erroneous. The judgment is therefore reversed and the cause remanded to the superior court, with direction to enter judgment in favor of the defendants.

In re COFFIN'S ESTATE.

Civ. 10484.

District Court of Appeal, First District, Division 2, California.

Aug. 30, 1937.

Rehearing Denied Sept. 29, 1937.

Hearing Denied by Supreme Court Oct. 28, 1937.

1. Executors and administrators ⚿189

Deceased's widow, stipulating at outset of probate proceeding for family allowance of stated sum monthly for ten months, did not waive and relinquish right to further allowance after such period.

2. Executors and administrators ⚿184

The right of deceased's widow to family allowance is strongly favored and will not be held waived or relinquished, unless language relied on clearly and explicitly manifests such intention.

3. Executors and administrators ⚿189

Any uncertainty in language of stipulation, claimed to constitute waiver of right to family allowance by deceased's widow after certain period, will be resolved in favor of such right.

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

In the matter of the estate of Albert Field Coffin, deceased. From an order granting a family allowance to Lulu Hannah Coffin, deceased's widow, Edith L. Bruse and others appeal.

Affirmed.

Prior opinion, 16 Cal.App.(2d) 532, 61 P.(2d) 81.

Leon French and Treat & Ogden, all of San Francisco, for appellants.

Charles A. Bliss, of Sacramento, and Clark & Heafey, of Oakland, for respondent.

SPENCE, Acting Presiding Justice.

This is an appeal by the residuary legatees from an order for family allowance.

In 1935, respondent, as the widow of the deceased, petitioned for a family allowance of $750 per month. On April 24, 1935, a written stipulation was filed providing "that the family allowance to the extent and amount of $300.00 per month shall be allowed and paid to said widow under her petition and out of the funds of the estate as and for family allowance and maintenance commencing with the payment of that amount upon the 5th day of May, 1935, for the succeeding month, and continuing at said rate for a period not to exceed ten months or until the final distribution of said estate, if earlier accomplished." An order was made at that time pursuant to said stipulation.

Thereafter respondent sought an increase in the amount of the allowance by filing a petition to modify the order previously entered. Said petition was heard on February 14, 1936. The court denied the petition for an increase, but ordered that the payment of $300 per month as directed in the order of April 24, 1935, be "continued commencing with the payment on the 5th day of March, 1936, and continuing monthly until the 5th day of July, 1936, or until final distribution of said estate in the event that said estate is so finally distributed before July 5, 1936." Respondent herein appealed from said order, but the order was affirmed. Estate of Coffin, 16 Cal.App.(2d) 532, 61 P.(2d) 81.

After the remittitur was filed, respondent filed a further petition seeking a continuance of said family allowance. On December 23, 1936, the court made its order that the sum of $300 per month be paid to respondent as family allowance "commencing with the 2nd day of December 1936, and continuing monthly thereafter until the further order of the court." This appeal is taken from said last-mentioned order.

[1-3] Appellants apparently contend that by the stipulation made at the outset of the probate proceeding providing for an allowance of $300 per month for ten months, respondent waived and relinquished all right to any further allowance after the expiration of that period and that the trial court was without jurisdiction to make such further allowance. We find no merit in said contention. It is well settled that the right to a family allowance is strongly favored in our law and that it will not be held to have been waived or relinquished except where the language relied upon clearly and explicitly manifests that intention. Estate of Bidigare, 215 Cal. 28, 8 P. (2d) 122; Estate of Gould, 181 Cal. 11, 183 P. 146; Estate of Whitney, 171 Cal. 750, 154 P. 855. We find no such language in the stipulation above set forth. It clearly appears that the parties intended to stipulate for the payment of a family allowance "at said rate for a period not to exceed ten months," but it is not at all clear that

the parties intended that said stipulation should thereafter bind anyone either as to amount or as to time. If appellants intended that the stipulation should constitute a waiver by respondent of the right to any family allowance after the expiration of a period of ten months, there was at least uncertainty in the language employed to accomplish their purpose and "any uncertainty in the language of the agreement will be resolved in favor of the right." Estate of Bidigare, 215 Cal. 28, 30, 8 P.(2d) 122. There is nothing in the holding in Estate of Coffin, supra, contrary to the views which we have expressed as the question there raised involved only the propriety of the order of the probate court denying to the widow an increase in the amount of the allowance upon a petition filed during the ten months' period covered by the stipulation.

The order is affirmed.

We concur: STURTEVANT, J.; JOHNSTON, Justice pro tem.

---

22 Cal.App.2d 450

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10582.

District Court of Appeal, First District, Division 1, California.

Aug. 28, 1937.

Hearing Denied by Supreme Court Oct. 25, 1937.

1. Dismissal and nonsuit 🔑60(6)

Statute, providing that an action shall be dismissed unless brought to trial within five years after complaint has been filed unless the parties have stipulated in writing that time may be extended, is mandatory and requires that the writing which will take a case out of the operation of the statute must clearly and definitely show that the statutory time was deliberately intended to be extended by both parties (Code Civ. Proc. § 583, as amended by St.1933, p. 853).

2. Mandamus 🔑43

Under statute providing for dismissal of action which has not been brought to trial within five years after plaintiff has filed his action unless stipulated in writing that time be extended, mandamus will lie to secure a dismissal unless the case falls indisputably within the statute, but, if there is a written stipulation, the terms of which may be reasonably construed as a waiver of the right to demand a dismissal, the trial court's decision as to scope of stipulation will not be disturbed by reviewing court (Code Civ. Proc. § 583, as amended by St.1933, p. 853).

3. Dismissal and nonsuit 🔑60(6)

Under statute providing for dismissal of action which is not brought to trial within five years after plaintiff has filed his action unless parties have stipulated in writing to extend the time, where action was commenced in 1932 but was dropped from the calendar in 1933, at which time attorneys for defendant wrote a letter stating that striking of the case should not operate to plaintiff's prejudice, trial court was justified in denying defendant's motion to dismiss the suit, entered in 1937, since letter was waiver of right to invoke the statutory provision (Code Civ.Proc. § 583, as amended by St. 1933, p. 853).

4. Appeal and error 🔑1008(3)

Generally, where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties, appellate court will not substitute another interpretation though it seems equally tenable.

Proceeding in mandamus by the Bank of America National Trust & Savings Association against the Superior Court of the State of California in and for the City and County of San Francisco.

Writ denied and proceeding dismissed.

Louis Ferrari, C. H. White, George D. Schilling, and Keyes & Erskine, all of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for petitioner.

J. Emmett Chapman and W. A. Lahanier, both of San Francisco, for respondent Albert Couderc.

KNIGHT, Justice.

Petitioner moved the superior court to dismiss an action pending therein against it upon the ground that the action had not been brought to trial within five years after the complaint was filed. Code Civ. Proc., § 583 (as amended by St.1933, p.

853). The motion was denied, and petitioner now seeks by this proceeding in mandamus to compel the dismissal thereof.

The action was in claim and delivery, instituted by Albert Couderc, on January 22, 1932, to recover corporate stock pledged with petitioner in October, 1929, by Couderc's father as collateral for loans made to him by petitioner. The answer was filed on April 7, 1932, and the cause was set to be tried on December 2, 1932, but at plaintiff's request and with petitioner's consent several postponements were granted. On October 22, 1932, the trial date was continued to December 8, 1932. On December 6, 1932, at the request of Couderc's then counsel, the case was continued to the December 16, 1932, resetting calendar. On December 16, 1932, the said cause was set for trial for February 1, 1933. On December 30, 1932, the trial date was continued from February 1, 1933, to February 15, 1933. But in the meantime and on January 24, 1933, plaintiff requested that the cause be dropped from the calendar. Petitioner's attorneys consented thereto, and on that date mailed a letter to the attorneys then representing plaintiff reading as follows: "Pursuant to our conversation this morning, it is agreeable to the defendant that you have the case in question stricken from the calendar, to be reset at a future date and time agreeable to yourselves, and that the striking of the case from the calendar pending the resetting of it for trial, shall not, and does not, operate to your prejudice and disadvantage in any respect so far as this defendant is concerned." Nothing further was done in the matter until February 26, 1937, when petitioner served its notice of motion to dismiss; and on March 17, 1937, the motion was heard and denied. Thereupon, Couderc's present attorneys proceeded to have the cause set for trial and entered into negotiations with petitioner's attorneys to take the deposition of the bank's employees and to obtain certain data from the bank's records. Such negotiations continued for two months or more, and were then terminated by the institution of this proceeding on June 12, 1937.

[1, 2] Section 583 of the Code of Civil Procedure declares that "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended." As contended by petitioner, the provisions of the foregoing section are mandatory, and in order to take a case out of the operation thereof the stipulation provided for in the exception must be in writing and it must clearly and definitely appear therefrom that the statutory time was deliberately intended to be extended by both parties. Miller & Lux Inc. v. Superior Court, 192 Cal. 333, 219 P. 1006. But with respect to the enforcement of the provisions of said section 583, it seems to be well settled that it is only where there is no written stipulation and the case falls indisputably within the mandatory provisions of said section that a defendant may proceed by way of mandamus to compel the dismissal of the action; and that if, on the other hand, it appears that there is a written stipulation, the terms of which may be reasonably construed as a waiver of the right to invoke the provisions of said code section, the trial court's decision, on motion to dismiss, as to the meaning, scope, and effect of such stipulation, constitutes a judicial determination which may not be disturbed by the reviewing courts in a mandamus proceeding instituted for such purpose. Ewell v. Superior Court, 69 Cal.App. 629, 232 P. 153. In other words, as said by the Supreme Court in the case of Charles L. Donohoe Co. v. Superior Court, 202 Cal. 15, 258 P. 1094, 1095: "It is only when there is an entire absence of any showing constituting good cause presented in the superior court upon the hearing of the motion to dismiss that a writ of mandate to compel the dismissal of the action may properly issue. [Citing authorities.]"

[3, 4] In the present case the trial court, in the exercise of its discretionary power to pass upon the merits of the motion to dismiss, construed the letter of January 24, 1933, as a waiver of the right to invoke the provisions of section 583, and obviously the terms of said letter support such construction. As will be noted therefrom, the attorneys for petitioner agreed that the striking of the case from the calendar "shall not, and does not, operate to your (the plaintiff's) prejudice and disadvantage *in any respect* so far as this defendant is concerned" (italics ours); and it would seem, therefore, that since the only prejudice or disadvantage which might accrue to the plaintiff on account of the indefinite dislodgment of the case from the trial calendar would be the running of

the five-year period mentioned in said section 583, the trial court was fully justified in construing the language used as having no other meaning than that petitioner would not invoke the provisions of said code section. There is no essential difference, in our opinion, between the meaning of the stipulation upheld in Ewell v. Superior Court, supra, and the import of the language here used. There it was provided that the case be dropped from the calendar and that "laches on the part of either party in bringing said action on for trial is hereby waived"; and here it was agreed that the dropping of the case from the calendar "shall not, and does not, operate to your prejudice and disadvantage in any respect so far as this defendant is concerned." In any event, the general rule is that where, as here, the construction given an instrument by the trial court appears to be consistent with the true intent of the parties, the appellate court will not substitute another interpretation, though it seems equally tenable. Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34.

Nor have we found anything in the cases cited by petitioner in support of the application herein which can be deemed as controlling in the present situation. In some of them, there was no written stipulation at all. Miller & Lux, Inc. v. Superior Court, supra; Andersen v. Superior Court, 187 Cal. 95, 200 P. 963; Crum v. Superior Court, 126 Cal.App. 471, 14 P.(2d) 785. Others involved merely the retrospective effect of the 1933 amendment to said section 583, which changed the starting time for the running of the five-year period from the date of the filing of the answer to the date of the filing of the complaint. Rosefield Packing Co. v. Superior Court, 4 Cal.(2d) 120, 47 P.(2d) 716; Miami Valley C. P. Co. v. Pacific Nat. Bank, 13 Cal.App.(2d) 621, 57 P.(2d) 233; Superior Oil Co. v. Superior Court, 6 Cal.(2d) 113, 56 P.(2d) 950. The point decided in Mercantile Investment Co. v. Superior Court, 218 Cal. 770, 25 P.(2d) 12, was that a written stipulation consenting to the filing of a third amended complaint had the effect of starting the running of the statute anew from the date of such filing. And in Prudential Ins. Co. v. Superior Court, 117 Cal. App. 528, 4 P.(2d) 294; Sedarovich v. Paul, 16 Cal.App.(2d) 452, 60 P.(2d) 871; Central Pacific R. R. Co. v. Riley, 31 Cal. App. 394, 160 P. 844; Barry v. Learner, 113 Cal.App. 651, 299 P. 82, and Pacific States Corp. v. Grant, 87 Cal.App. 108, 261 P. 1100, the written instruments relied on as stipulations did not go beyond the point of consenting to the dropping of the cases from the calendar, to be reset on notice, and contained no agreement, as here, that such dislodgment should not "in any respect" operate to the prejudice or disadvantage of the plaintiff.

The writ is denied, and the proceeding is dismissed.

We concur: TYLER, P. J.; CASHIN, J.

22 Cal.App.2d 387

YATES v. J. H. KRUMLINDE & CO. et al.

Civ. 10383.

District Court of Appeal, First District,
Division 2, California.

Aug. 24, 1937.

1. Appeal and error 🔑1067

In action against truck driver and employer for injuries sustained by plaintiff, who claimed he was a passenger for compensation within statute, when struck by gate while riding on running board of truck and guiding driver through gates, refusal to give defendants' instruction that if plaintiff rode on truck solely for his own pleasure, voluntary assistance given to defendants would not change plaintiff from guest to passenger for compensation was prejudicial error (St.1931, p. 1693, § 141¾).

2. Automobiles 🔑181(3)

Where person accepts ride from another for his own pleasure, he does not become a "passenger for compensation" within meaning of vehicle act merely because he performs some incidental voluntary service en route (St.1931, p. 1693, § 141¾).

3. Automobiles 🔑246(2)

In personal injury action by one who claimed to have been passenger for compensation in automobile within meaning of vehicle act, instruction that if jury believed from evidence that plaintiff rode on automobile solely for his own pleasure and benefit and any help or assistance given to defendants was "volunteered" by plaintiff,

plaintiff was a guest and not passenger for compensation was not improper on ground that the word "volunteered" was indefinite (St.1931, p. 1693, § 141¾).

4. **Automobiles** ⚷245(87)

In absence of statutory prohibition, to ride on running board of motor vehicle is not negligence as matter of law.

5. **Automobiles** ⚷245(24, 87)

In action against truck driver and employer for injuries sustained by plaintiff, who claimed he was a passenger for compensation within meaning of vehicle act, when struck by gate while riding on running board of truck and guiding driver through gates, questions of negligence and contributory negligence were for jury (St. 1931, p. 1693, § 141¾).

6. **Automobiles** ⚷246(22)

In action against truck driver and employer for injuries sustained by plaintiff, who claimed he was a passenger for compensation within meaning of vehicle act, when struck by gate while riding on running board of truck and guiding driver through gates, instruction that if accident occurred solely by reason of sudden gust of wind blowing gate, without negligence on driver's part, plaintiff could not recover, was proper (St.1931, p. 1693, § 141¾).

◆

Appeal from Superior Court, San Francisco County; Daniel C. Deasy, Judge.

Action by Walter Yates against the J. H. Krumlinde & Co. and others. From a judgment in favor of the plaintiff, the defendants appeal.

Reversed.

James H. Phillips, of Oakland, and Cooley, Crowley & Supple, of San Francisco, for appellants.

Charles B. Morris, John T. McCarthy, and J. Bruce Fratis, all of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal by defendants from a judgment for personal injuries entered pursuant to the verdict of a jury.

Plaintiff and respondent had previously been employed by appellant J. H. Krumlinde & Co., a copartnership, and on August 7, 1934, he went to the plant of the copartnership in San Francisco, seeking reemployment. He was not employed that day but rode to South San Francisco with appellant Lotti, one of the members of the copartnership, upon a truck driven by Lotti, and in South San Francisco received the injuries for which judgment was entered in this action.

One of the defenses was that respondent was a guest within the meaning of section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St.1929, p. 1580, as amended by St.1931, p. 1693). The evidence was in flat conflict as to the circumstances preceding respondent's going with Lotti on the truck and what occurred thereafter. Respondent testified that he had helped Lotti load the truck; that when Lotti was about to start for South San Francisco, Lotti said to respondent: "Do you want to take a ride to South City?" to which respondent answered: "Yes"; that on the way to South San Francisco at Lotti's request respondent helped Lotti unload some shingles from the truck; that when they arrived at the plant of the Edward's Wire Rope Company, where the balance of the load was to be delivered, Lotti asked respondent to guide him through some gates and around a tank, and, while respondent pursuant to this request was on the running board of the truck, one of the gates swung against respondent's leg causing the injury complained of.

Lotti, on the other hand, testified that respondent did not help him load the truck; that he did not ask respondent to ride with him to South San Francisco, but on the contrary, respondent said: "I think I will take a ride," to which Lotti answered: "O. K. Let's go"; that respondent did help Lotti unload some shingles en route but that Lotti did not ask him to do so; and that Lotti did ask respondent to help him through the gates and past the tank.

[1] The court refused an instruction proposed by appellants in the following language:

"You are instructed that if you believe from the evidence that the plaintiff, Walter Yates, rode on the automobile truck of the defendants solely for his own pleasure and benefit, and any help or assistance that he may have given to the defendants or either of them was volunteered by the plaintiff, then you are instructed that the plaintiff herein was a guest at the time and place of this accident and was not a passenger for compensation."

The court also gave at respondent's request three instructions, Nos. XXXIV, XXXV, and XXXVII, in each of which the jury was informed in varying language that if respondent conferred any benefit upon the driver of the truck or upon the defendants other than the mere pleasure of his company, he was not a guest but a passenger for compensation.

We are satisfied that the refusal to give appellants' proposed instruction and the giving of the three instructions noted was error prejudicial to appellants.

[2] The so-called guest law has recently been clarified in two decisions of the Supreme Court: McCann v. Hoffman, 70 P.(2d) 909, and Walker v. Adamson, 70 P.(2d) 914. Under those decisions, we must now take it to be settled that if a person accepts a ride from another for his own pleasure, he does not become a passenger for compensation merely because he may perform some incidental voluntary service en route. Under the instructions given, the jury may have believed Lotti's testimony above set out in toto and still they would be bound to find that respondent was a passenger for compensation because he did confer a benefit upon Lotti other than the pleasure of his company when he helped him unload the shingles.

We take it as settled that if respondent went with Lotti for his own pleasure, the mere fact that as a courtesy or social amenity he helped him unload the shingles, or helped him open the gates and pass through, would not standing alone change his status from guest to passenger for compensation. On the other hand, if Lotti and respondent both had in mind respondent's assisting Lotti on the trip, or if Lotti's speech and conduct was such as to lead respondent, as a reasonable man, to believe that that was Lotti's purpose, the jury would be justified in finding that respondent was a passenger for compensation and not a guest.

The trial court evidently assumed, under the decisions theretofore rendered, that any benefit conferred on the driver would take the person carried out of the guest status. This assumption, while a natural one, was not correct as a matter of law under the recent decisions above cited, and appellants were entitled to have the jury clearly instructed on the subject.

[3] Respondent's criticism of appellants' proposed instruction as uncertain or indefinite in the use of the word "volunteered" we regard as unwarranted. The jury could have had no doubt of the meaning of the instruction, and, in our opinion, the proposed instruction was correct as a matter of law.

Since the case may be retried, we note other claims of error. The evidence most favorable to respondent showed that the entrance to the Edward's plant was through double gates each six feet nine inches wide; that Lotti asked respondent to help him through the gates and around a tank inside; that respondent opened the gate on the right and put a large rock against it to hold it open; that respondent then got on the right running board of the truck and Lotti started to drive through the gates at a speed of two or three miles an hour; that the right-hand gate in some manner got free and started to swing toward the truck; that respondent seeing the gate swinging toward the truck "hollered" to Lotti to "whoa"; that respondent could have jumped from the running board before the gate struck him but believed Lotti would stop; that when Lotti did not stop respondent yelled "whoa" again and tried to jump off; that as he was trying to jump he looked into the cab and saw Lotti with both hands off the steering wheel leaning on his right elbow trying to fix the catch on the door; and that before respondent could jump, the gate swung against him.

Appellants claim that respondent was guilty of contributory negligence as a matter of law; that appellants were not guilty of any negligence; and that respondent's right to recover is barred by his assumption of risk in riding on the running board of the truck.

[4] The last contention is answered by the cases holding that in the absence of statutory prohibition it is not negligence as a matter of law to ride on the running board of a motor vehicle. Ivancich v. Davies, 186 Cal. 520, 199 P. 784; Strong v. Olsen, 74 Cal.App. 518, 241 P. 107.

[5] On the questions of negligence and contributory negligence, we think the case properly went to the jury. The case is close, but the jury could find Lotti negligent in taking his hands from the steering wheel and his eyes from the road and devoting his attention to the door while his truck was in motion, and that but for the negligence he would have seen the gate or heard respondent's warning and brought the truck to a stop in time to avoid the injury. On the question of contributory

negligence, while respondent by jumping earlier could have avoided the injury, it was for the jury to say whether as a person of ordinary prudence he was justified in remaining on the running board in the belief that Lotti would stop the truck.

[6] Appellants' proposed instruction that if the casualty occurred solely by reason of a sudden gust of wind blowing the gate, without negligence on Lotti's part, plaintiff could not recover might well have been given.

Judgment reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

22 Cal.App.2d 508

HAMBURGH et al. v. HYS et al.

Civ. 10540.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1937.

1. Marriage 🔑40(1)

In action for injuries to wife and damages to plaintiffs' automobile, introduction of marriage license and certificate, with oral testimony showing that plaintiffs had been married by a minister and had thereafter deported themselves as husband and wife, created a presumption that plaintiffs were lawfully married and would sustain a joint judgment for plaintiffs casting burden on defendant to show invalidity of such marriage (Code Civ.Proc. § 1963, subds. 1, 30).

2. Marriage 🔑40(10)

In action for injuries to wife and damages to plaintiffs' automobile, record showing that no decree of divorce had been obtained by wife in her proceedings for divorce from her former husband was insufficient to overcome presumption that plaintiffs were lawfully married, so as to preclude the rendering of a joint judgment in favor of plaintiffs (Code Civ.Proc. § 1963, subds. 1, 30).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Suit by Virginia Hamburgh and another against Michael Hys and another. From a joint judgment for the plaintiffs, the defendants appeal.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, for appellants.

James R. Agee and Minett F. Hallmark, both of Oakland, for respondents.

SPENCE, Acting Presiding Justice.

Plaintiffs sued as husband and wife to recover damages for personal injuries to plaintiff Virginia Hamburgh and for injuries to their automobile. They recovered a joint judgment in the sum of $2,500, and from said judgment defendants appeal.

The sole contention made by appellants is that: "The joint judgment in favor of plaintiffs is contrary to law and without support in the evidence for the reason that the evidence established that plaintiffs were not husband and wife." We find no merit in this contention.

[1] The marriage license and marriage certificate were introduced in evidence together with oral testimony showing that respondents had been married by a minister in Hollister on May 9, 1936. It also appeared that said parties had thereafter deported themselves as husband and wife. The foregoing evidence gave rise to a presumption that said parties had entered into a lawful contract of marriage (Code Civ. Proc. § 1963, subds. 1, 30), and the burden was then cast upon appellants to show the invalidity of such marriage. Marsh v. Marsh, 79 Cal.App. 560, 250 P. 411.

[2] The only evidence relied upon by appellants for the purpose of showing such invalidity was brought out upon the cross-examination of respondent Virginia Hamburgh. While she testified on such cross-examination that she had been divorced from George Albert, her former husband, defendants introduced the record in a certain divorce proceeding instituted by said respondent, and it appeared therefrom that no decree of divorce had been obtained in said proceeding. Appellants claim that the record here shows that no divorce had been obtained either in that proceeding or any other proceeding instituted by said respondent or her former husband. Assuming, without deciding, that the record so shows, such evidence alone was insufficient to meet the burden cast upon

appellants. We find no evidence in the record showing that the former marriage had not been annulled or that the former husband had not died prior to the marriage of said respondents. In the absence of such evidence, the presumption in favor of the validity of the marriage of respondents was not overcome and appellants' claim "that the evidence established that plaintiffs were not husband and wife" may not be sustained. Estate of Pusey, 173 Cal. 141, 159 P. 433; Estate of Hughson, 173 Cal. 448, 160 P. 548; Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95; Hunter v. Hunter, 111 Cal. 261, 43 P. 607, 52 Am.St. Rep. 167; Immel v. Dowd, 6 Cal.App.(2d) 145, 44 P.(2d) 373; Luckett v. La Tour, 122 Cal.App. 271, 9 P.(2d) 886; Marsh v. Marsh, supra; see, also, 18 R.C.L. p. 416 et seq., and notes in 77 A.L.R. 729 and 34 A.L.R. 464.

The judgment is affirmed.

We concur: STURTEVANT, J.; JOHNSON, Justice pro tem.

---

22 Cal.App.2d 503

PEOPLE v. ONE PONTIAC 8 SEDAN, ENGINE NO. 8-73976.

Civ. 10474.

District Court of Appeal, First District, Division 2, California.

Sept. 2, 1937.

1. Forfeitures 🔑5

Under provision of Narcotic Act authorizing forfeiture of automobile unless claimant was without knowledge that automobile was to be used for purpose for which forfeiture is claimed, the people are not required to prove that an investigation by claimant would have developed knowledge of an intended illegal use of automobile to justify the forfeiture (St.1935, p. 2210, § 15(e, f).

2. Forfeitures 🔑5

Automobile was subject to forfeiture under the Narcotic Act in the absence of proof by assignee of conditional sales contract who opposed such forfeiture that his claim was bona fide and that his interest had been acquired after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the automobile was being or was to be used for the purpose charged, as required by the act (St.1935, p. 2210, § 15(e, f).

3. Forfeitures 🔑1

Forfeitures are not favored in law and statutes declaring forfeitures are strictly construed.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Proceeding by the People against One Pontiac 8 Sedan, Engine No. 8-73976, to obtain an order of forfeiture under the State Narcotic Act (St.1929, p. 380, as amended), wherein Richard McAfee, the registered owner, and the Anglo California National Bank appeared and answered. Judgment ordering the forfeiture, and the Anglo California National Bank appeals.

Affirmed.

Robert G. Partridge, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L Sefton, Deputy Atty. Gen., for the People.

SPENCE, Acting Presiding Justice.

This proceeding was brought to obtain an order of forfeiture of a certain automobile under the provisions of the State Narcotic Act. Deering's Gen.Laws Act 5323 (St.1929, p. 380, as amended). Richard McAfee, the registered owner, and Anglo California National Bank, the legal owner, appeared and answered. After a trial by the court, findings were made in favor of plaintiff and from the judgment ordering the forfeiture, the Anglo California National Bank has appealed.

The automobile was purchased by McAfee on a conditional sales contract from Hoppert & Bergesen. Said contract was thereafter assigned to said bank. In response to allegations made in the answer of said bank, the trial court found that it was untrue that the conditional sales contract or the interest of the bank was created "after a reasonable investigation of the moral responsibility, character and reputation of the purchaser, Richard McAfee." No attack is made upon said finding, and a review of the evidence shows that no such investigation was made.

[1] The briefs herein are devoid of appropriate headings [rule VIII, section 2, of the Rules of the Supreme Court and District Courts of Appeal; Herlihy v. Ward, 129 Cal.App. 434, 18 P.(2d) 992; Holland v. Kodimar (Cal.App.) 68 P.(2d) 988; Lady v. Smith (Cal.App.) 65 P.(2d) 76], but it appears to be the bank's contention that it was not required to prove that such investigation had been made in the absence of a showing by respondent that such an investigation would have developed knowledge of the intended illegal use. We find no merit in this contention.

The act (section 15, subd. (e), as amended, by St.1935, p. 2210, is entirely clear upon the subject. It provides in part "the claimant of any right, title or interest in said automobile or other vehicle *may prove* his lien, mortgage, or conditional sales contract to be bona fide and that such right, title or interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser and without any knowledge that the automobile or other vehicle was being, or was to be, used for the purpose charged." Immediately following said portion of subdivision (e) is found this language of subdivision (f): *"In the event of such proof,* the court shall order said automobile or other vehicle released to such bona fide or innocent owner, lien holder, mortgagee or vendor." (All italics ours.)

[2] There is, therefore, no doubt that the Legislature placed upon the claimant the burden of proof as to the three elements which are conjunctively enumerated in the above-quoted portion of the statute. In the absence of such proof by the bank, as assignee of the conditional sales vendor, the trial court properly found against the allegations of its answer and entered judgment in favor of respondent. This view finds support in People v. One Harley-Davidson Motorcycle, 5 Cal.(2d) 188, 53 P.(2d) 970, People v. One Ford, 12 Cal.App.(2d) 517, 55 P.(2d) 908, and People v. One Lincoln Eight, 12 Cal.App. (2d) 622, 55 P.(2d) 925.

[3] While it is true that forfeitures are not favored in law and that statutes declaring forfeitures well be strictly construed, the statute here leaves no room for construction on the subject under discussion. It is not claimed that said statute is unconstitutional in any respect, and the courts may not rewrite the clear provisions thereof under the guise of construing said provisions.

The judgment is affirmed.

We concur: STURTEVANT, J.; JOHNSTON, Justice pro tem.

22 Cal.App.2d 475

LEAPER v. GANDY.

Civ. 11471.

District Court of Appeal, Second District, Division 2, California.

Aug. 31, 1937.

Rehearing Denied Sept. 23, 1937.

1. Libel and slander 🔑**7(2)**

Under statute making it a misdemeanor to enter on or detain any land of another by force or violence, an accusation that a party was a crook, a thief, and a lockbreaker for having used storage room as a garage without owner's permission, and that owner was going to have such party arrested was actionable per se (Pen.Code, § 418; Civ.Code, § 46).

2. Appearance 🔑**9(2)**

A defendant who desires to stand on the ground that the court is without jurisdiction over his person must specially appear for that purpose only.

3. Appearance 🔑**19(1)**

A defendant may not file an answer and, after losing the case, depend on a claim that the court was without jurisdiction of the person.

4. Appearance 🔑**19(2)**

Defendant having filed a demurrer which was overruled and thereafter having proceeded to trial could not demand that court enter judgment in his favor notwithstanding the verdict.

5. Appeal and error 🔑**979(2)**

It is within trial court's province to pass on sufficiency of evidence and the appellate court may not reverse an order thereon unless it clearly appears that the trial court abused its discretion.

6. New trial 🔑**76(6)**

The trial court had authority to grant a new trial on ground that verdict of $2,000 for slander consisting of defendant's accusation that plaintiff was a thief and lockbreaker in having employed defendant's storage house as a garage without owner's permission was excessive.

7. Costs ⟹18

Plaintiff in slander suit is barred from recovering costs where judgment was one which could have been rendered by municipal court (Gen.Laws 1931, Act 4317, § 7; Code Civ.Proc. § 1032, as added by St.1933, p. 1901).

8. Costs ⟹4

Statute which precluded plaintiff in slander suit from recovering counsel fees as costs where judgment was one which could have been rendered by a municipal court *held* not unconstitutional (Code Civ. Proc. § 1032, as added by St.1933, p. 1901).

9. Constitutional law ⟹248

Plaintiff in slander suit who would have been entitled to allowance of $100 to cover counsel fees in addition to other costs if he had commenced his action in the proper tribunal was not entitled to complain that in tribunal where suit was brought successful defendant was given right to counsel fees, but plaintiff was not, since claim of unequal treatment by the law was based on plaintiff's own error in seeking relief in the wrong tribunal (Gen.Laws 1931, Act 4317, § 7; Code Civ.Proc. § 1032, as added by St.1933, p. 1901).

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis and Robert W. Kenny, Judges.

Action by W. J. Leaper against N. S. Gandy. Order denying defendant's motion for judgment notwithstanding a verdict for plaintiff and defendant appeals; order striking plaintiff's cross-bill and order granting defendant's motion for new trial, and plaintiff appeals.

Affirmed.

Fogel, Beman & Jones, of Los Angeles, and Richard K. Gandy, of Santa Monica, for appellant.

Clay & Handy, of Los Angeles, for respondent.

WOOD, Justice.

In an action for slander plaintiff recovered a judgment against defendant in the sum of $2,000 following the return of a jury's verdict. Defendant's motion for judgment notwithstanding the verdict was denied by the court, from which order defendant appeals. The trial court made an order striking out plaintiff's cost bill and also made an order granting defendant's motion for a new trial on the ground that the evidence is insufficient to sustain the verdict "in respect to the amount of damages." Plaintiff appeals from the two orders last mentioned.

Defendant was the owner of a certain building in the city of Riverside in which were a number of stores. One of these stores was occupied by a company selling groceries and meats and plaintiff was employed as manager of the meat department. In the rear of the building and on the same parcel of land there was a warehouse or storage room divided into two separate rooms by a partition. One of these rooms was occupied by a tenant, but the other was vacant for some time and the last tenant to occupy it gave permission to plaintiff to keep his automobile in the room. Plaintiff placed his car in this vacated room during the hours of his employment, but did not obtain permission to do so from the defendant, who resides in the city of Santa Monica.

Upon one of his visits to Riverside defendant noticed plaintiff's car in the storage room. He then approached plaintiff in the store and in the presence of others and in a loud and angry voice called him a "crook," a "thief," and a "lockbreaker." He said to plaintiff: "You are a damn thief to steal a man's property * * * you broke the lock and broke into the place." The defendant also said that he was going to the district attorney and swear out a warrant for plaintiff's arrest. The witnesses who testified concerning the use of this language by defendant stated that it was made in connection with defendant's charge that plaintiff was improperly using the storage room.

[1] Both parties contend that the language is unambiguous, but they do not place the same construction upon it. Plaintiff contends that defendant's language is actionable per se, that it charges plaintiff with crime and tends directly to injure him in respect to his trade or business. Defendant disputes these contentions and argues that since the word "thief" was used in connection with the occupancy of the storage room, it was meant to be and was understood by the auditors that no crime was

charged. In our view, the language is actionable per se. In section 418 of the Penal Code it is provided that "Every person using * * * force or violence in entering upon or detaining any lands or other possessions of another * * * is guilty of a misdemeanor." Defendant called plaintiff a lockbreaker in connection with his occupancy of the building, and threatened to swear out a warrant for plaintiff's arrest. In so doing, he charged plaintiff with crime in such manner as to come within the provisions of section 46 of the Civil Code.

[2-4] In the original complaint F. A. Gandy, wife of N. S. Gandy, was named defendant. When F. A. Gandy filed her answer, plaintiff amended the complaint and brought in N. S. Gandy as defendant in the action. Later the complaint was dismissed as to F. A. Gandy. When summons upon the amended complaint was served upon N. S. Gandy, he moved to strike out the complaint and at the same time filed a demurrer. His motion was denied and his demurrer overruled. He then answered and the action was tried on the merits. The trial court held that he had waived his right to strike out the amended complaint by filing the demurrer. A defendant who desires to stand upon the ground that the court is without jurisdiction over his person must specially appear for that purpose only. He must stand upon his naked legal right and ask nothing further. 3 Cal.Jur. 18. The authorities are reviewed in Remsberg v. Hackney Manufacturing Co., 174 Cal. 799, 164 P. 792, where it is pointed out that the earlier contrary decisions had been reversed and that a defendant could not file an answer and, after losing the case, depend upon his claim that the court was without jurisdiction of the person. In re Clarke, 125 Cal. 388, 58 P. 22, is in point. It was there held that one cannot avail himself of the advantage of being a party and escape the responsibilities; that it would be unjust and illogical to give a defendant, whose objections to the jurisdiction of the court have been erroneously overruled, an opportunity to go to trial, and if the judgment is favorable to abide upon it, and if it is unfavorable to procure a reversal. The defendant in the present action having filed a demurrer and having proceeded to trial is not now in position to demand that the court enter a judgment in his favor notwithstanding the verdict.

[5, 6] Taking up the appeal of plaintiff, it is apparent that the order of the trial court granting a new trial was made because the judge considered the verdict to be so excessive as to indicate that it was the result of passion or prejudice. It was within the province of the trial court to pass upon the question of the sufficiency of the evidence and this court may not reverse the order unless it clearly appears that the trial court abused its discretion. Beckley v. Harris, 84 Cal.App. 557, 258 P. 428. In Sherwood v. Kyle, 125 Cal. 652, 58 P. 270, the plaintiff, a school teacher, was given a verdict in the sum of $1,000 in an action for slander. The trial court granted a motion for a new trial on the ground that the verdict was excessive and this order was affirmed. See, also, Bonner v. Los Angeles Examiner, 17 Cal.App.(2d) 458, 62 P.(2d) 427. We cannot hold that the trial court abused its discretion in the case now before us.

[7-9] The appeal of the plaintiff from the order striking out his cost bill need not be considered except for the possibility that it might arise in future proceedings in the trial court. The order striking out the cost bill is in accordance with section 1032 of the Code of Civil Procedure (as added by St.1933, p. 1901), which provides that plaintiff shall not recover costs when the judgment is one which could have been rendered by a municipal court. Plaintiff contends, however that under Act 4317, Deering's General Laws, 1931, volume 2, pages 2160, 2161, § 7, he was entitled to counsel fees in the sum of $100. The point was decided adversely to plaintiff's contention in Lady v. Palen, 12 Cal.App.(2d) 3, 54 P.(2d) 1134. Plaintiff points out, however, that in the last-mentioned case the question of the constitutionality of section 1032 of the Code of Civil Procedure was not considered because it had not been properly presented in the briefs and asks us now to consider his argument that he is denied the equal protection of the law. The constitutionality of the statute providing for counsel fees in actions of this nature has been upheld. Engel v. Ehret, 21 Cal.App. 112, 130 P. 1197; Carpenter v. Ashley, 16 Cal.App. 302, 116 P. 983. Plaintiff argues that a situation different from the situation in the cases just cited is presented by the circumstances of the present case in that defendant is given the right to counsel fees in the event of winning the case whereas plaintiff

is not given attorney's fees if his recovery is within the jurisdiction of the municipal court. The answer to this contention is apparent. If plaintiff had commenced his action in the proper tribunal, he would have been entitled to an allowance of $100 to cover counsel fees in addition to other costs. In that event, he would have been on an equal footing with his adversary. The claim of unequal treatment by the law is based upon his own error in seeking relief in the wrong tribunal.

The order denying the motion for judgment notwithstanding the verdict and the order granting a new trial are and each is affirmed. Neither party is to recover costs on appeal.

We concur: CRAIL, P. J.; McCOMB, J.

22 Cal.App.2d 440

PEOPLE v. LININGER.

Cr. 2995.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1937.

Bigamy ⚷1

A marriage solemnized by a minister of the gospel in a different county than that in which license was issued was not void, and hence, where no divorce was secured by either husband or wife nor any annulment proceedings started by them and husband remarried, a conviction for bigamy would be sustained (Civ.Code, §§ 68, 71).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Earl Francis Lininger was found guilty of bigamy after a trial by the jury had been waived and cause submitted upon a stipulation of agreed facts. From an order granting the defendant's motion for a new trial, the People appeal.

Reversed.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., Buron Fitts, Dist. Atty., and Jere J. Sullivan and Percy V. Hammon, Deputies Dist. Atty., all of Los Angeles, for the People.

Emrys Davis, of Los Angeles, for respondent.

YORK, Justice.

Trial by jury having been duly waived and the cause submitted upon a stipulation of agreed facts, defendant was found guilty of the crime of bigamy, as charged in the information. From an order granting defendant's motion for a new trial, the People prosecute this appeal.

From the stipulation of facts, hereinbefore referred to, it appears that defendant together with Ruby Myrtle Armstrong on the 20th day of June, 1929, obtained a license to marry in Los Angeles county; that they then proceeded to San Diego county, where a "duly ordained and authorized" minister of the gospel performed a marriage ceremony and pronounced the said parties husband and wife; that they then returned to Los Angeles county, where they lived together as husband and wife until some time in the year 1934, and while so living together a child was born to them; that no divorce or annulment proceeding was ever initiated by either of them; that the only marriage ceremony performed between said parties was the one performed in San Diego county. It further appears that on August 26, 1936, defendant and Mildred Evelyn Ritchey procured a license to wed in Ventura county, where they were married by a "duly ordained and authorized" minister of the gospel, and thereafter for a period of approximately six months they lived together as husband and wife; that no divorce or annulment of said marriage has ever been instituted by either party.

The question presented by this appeal is the following: "Is a marriage solemnized by a minister of the gospel in one county of this state upon a marriage license issued to the parties in another county of this state void or valid?" For the purposes of this decision, the answer to this question is contained in sections 68 and 71 of the Civil Code, which read as follows:

Sec. 68. "Marriage must be licensed, solemnized, authenticated, and recorded as provided in this article; but non-compliance with its provisions by others than a party to a marriage does not invalidate it."

Sec. 71. "No particular form for the ceremony of marriage is required, but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife."

There is nothing in the point that the mere fact that the marriage occurred in a different county than that in which the license was issued makes the marriage absolutely void. "No divorce was ever secured by either of said parties, nor any annulment proceedings ever started by either of them." We are therefore of the opinion that the trial court erred in granting the motion for new trial.

The order is reversed.

We concur: HOUSER, P. J.; DORAN, J.

---

22 Cal.App.2d 492

PEOPLE v. ASAVIS.

Cr. 2997.

District Court of Appeal, Second District, Division 1, California.

Sept. 1, 1937.

Hearing Denied by Supreme Court Sept. 30, 1937.

1. Criminal law 🔑369(1)

In prosecution for commission of a sexual offense, evidence of commission of other similar acts by the defendant with persons other than the prosecuting witness ordinarily is inadmissible.

2. Criminal law 🔑369(2)

In prosecution for commission of a sexual offense, evidence of assault by defendant upon or acts of intercourse with persons other than the prosecutrix is not admissible unless they are parts of the same transaction or unless statements in respect thereto are so connected in a confession with statement pertaining to the offense charged that it is impossible to exclude part of the confession without excluding all of it or unless defendant by his own testimony or otherwise claimed innocent intent.

3. Criminal law 🔑369(1)

In prosecution for commission of a lewd and lascivious act upon female child under the age of 14 years, testimony of a third witness, a female child, that upon a previous occasion defendant had committed an act of somewhat similar nature, was improperly admitted where defendant denied that any improper act had taken place and no issue of innocent intent was involved (Pen.Code, § 288).

4. Criminal law 🔑921

In prosecution for commission of a sexual offense, where evidence has been admitted of similar acts by defendant with persons other than prosecuting witness, and case does not fall within any exceptions which would make such evidence properly admissible, defendant is entitled to a new trial.

5. Criminal law 🔑695(2)

An objection to testimony which is manifestly incompetent and which cannot be met no matter how specific need not be specific.

6. Criminal law 🔑921

In prosecution for lewd and lascivious act upon female child under the age of 14 years, where evidence was improperly admitted of similar acts with witnesses other than the prosecuting witness, and such evidence carried considerable weight with trial judge, as appeared from his findings, defendant was entitled to a new trial (Pen. Code, § 288).

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Fred L. Asavis was convicted of a lewd and lascivious act upon and with the body of a female child under the age of 14 years, and he appeals.

Reversed and remanded for new trial.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

From a "judgment and sentence" that ensued upon his conviction of the criminal offense denounced by the provisions of section 288 of the Penal Code, to wit, that of the commission of "a lewd and lascivious act upon and with the body of * * * a female child under the age of fourteen years * * *," defendant has appealed to this court.

As constituting a compelling reason for an order by this court by which the judgment would be reversed, appellant urges the point "that the testimony of other alleged offenses not charged in the information was improperly received by the court and constituted irreparable error." Similarly, appellant also asserts "that the court improperly received and considered evidence (relating to "other offenses") too remote and unconnected with the charge in the information, said evidence constituting prejudicial error."

Since it is apparent that in principle both of such points are closely related one to the other, they will be considered as one. From the record herein, it appears that in the People's case in chief, the testimony of a minor female child of the age of eleven years was presented to the effect that theretofore, on an errand of delivering "religious literature," the child had gone to the home of defendant, and at his invitation had entered his house; that at that time, when she first saw defendant, "he had his pants on and undershirt"; that he then went into a bedroom, and on emerging therefrom wore a bathrobe only, which was open so that she saw "his private parts"; that he then took the child by the wrist and "two or three times" led her through all the rooms of the house, looking for a picture which he said he had and which he wished the child to see; that failing to find the picture, he sat on a chair and took the child on his lap; that his legs were "nude, naked; * * * his private parts were exposed"; that the child was on the lap of defendant "probably about five or ten minutes"; that upon defendant's inquiry of the child as to what was the meaning of a picture that appeared on the cover page of one of her so-called "religious literature" folders, and on receiving her reply with reference to such question, defendant released the child; whereupon she left his home, but immediately thereafter continued to deliver to twenty or thirty houses the "literature" which she had been distributing.

With respect to the other matter in the same connection, the record discloses that on the cross-examination of defendant, particularly with reference to the testimony that just has been narrated, defendant was asked by the deputy district attorney who was in charge of the prosecution regarding a former asserted impropriety which the deputy district attorney insinuated theretofore had taken place between defendant and a third female child. Such examination was as follows:

"Q. And you had other little children in the house under the same circumstances, haven't you, Mr. Asavis? A. No, I haven't.

"Q. How about ———? A. I have not.

"Q. Never had ——— in your house at any time? A. Not by myself.

"Q. She wasn't in your house about three years ago? A. No, she was not.

"Q. Well, you have a chicken pen at your place, haven't you? A. Yes, I have two of them.

"Q. And you had ——— out there, didn't you? A. I did not.

"Q. At no time? A. At no time.

"Q. And at that time you never exposed your person? A. No, I did not.

"Q. Nor at any time fondle her, is that right? A. That is right."

But that was not all. In so-called rebuttal of the testimony that defendant had thus given on cross-examination, the third female child was permitted to give her testimony. She testified that the incident in question had occurred at a time when she was six years old, which was three or four years before she gave her instant testimony. The examination then proceeded as follows:

"Q. * * * Kindly state what happened? A. Well, I went over to see their little daughter Joan, and they were not home, and somehow I got behind the chicken barn there and he made me touch his private parts.

"Q. Well, what did he do? You say he made you touch his private parts. What did he do, take your hands ——— A. Yes.

"Q. And did he put his hands on your private parts? A. No.

"Q. What did he do? A. He just made me touch his private parts with my hand.

"Q. With your hand. Well, what did he say to you; did he say anything to you at that time? A. No, he did not.

"Q. Well, did he have his private parts exposed? A. No.

"Q. Well, where were they, in his pants or out? A. In his pants.

"Q. And he had you put your hand over them? A. Yes.

"Q. And how long did he keep you there? A. Oh, just a minute or two and then he let me go for a minute and I ran for my bike and scrammed home. I wasn't old enough to know about it then."

[1-3] Not only by the appellate courts of the state of California, but also by many other courts having similar jurisdiction, it has been ruled that upon the trial of a defendant on a charge of the felonious commission by him of a sexual offense, evidence of like commission of other similar acts by the defendant with persons other than the prosecuting witness ordinarily is inadmissible. The case of People v. Anthony, 185 Cal. 152, 196 P. 47, 49, was one in which the defendant therein was charged with the commission by him of an offense of the same character as that here involved. One of the issues that was presented on that appeal related to the admissibility of evidence of the commission of similar acts by the defendant with persons other than the prosecuting witness. The court gave the question full consideration, and, in part, said: "Our law wholly rejects this character of testimony, not because it does not tend to prove the truth of the charge, but because of a just regard for the rights of the defendant, who, if confronted by such witnesses, instead of being compelled to stand trial on one charge made against him, would be confronted by half a dozen or more charges. Our rule confining the testimony to the crime charged in the information has only been relaxed so far as to permit testimony of similar conduct with the complaining witness."

See, also, People v. Bowen, 49 Cal. 654; People v. Stewart, 85 Cal. 174, 175, 24 P. 722; People v. Elliott, 119 Cal. 593, 51 P. 955; People v. Letoile, 31 Cal.App. 166, 159 P. 1057; Abaly v. State, 163 Wis. 609, 158 N.W. 308; State v. Wellman, 253 Mo. 302, 161 S.W. 795; State v. Start, 65 Or. 178, 132 P. 512, 46 L.R.A.(N.S.) 266; State v. McAllister, 67 Or. 480, 136 P. 354; Webb v. State, 80 Tex.Cr.R. 1, 187 S.W. 485; State v. Vance, 119 Iowa, 685, 94 N.W. 204.

In volume 16 of Corpus Juris, at page 610, the rule is thus stated: "Evidence of assaults by defendant upon, or acts of intercourse with, persons other than the prosecutrix is not admissible, unless they are parts of the same transaction; or unless statements in respect thereto are so connected in a confession with statements pertaining to the offense charged that it is impossible to exclude part of the confession without excluding all of it; or unless, according to some cases, defendant by his own testimony or otherwise claims an innocent intent."

In People v. Knight, 62 Cal.App. 143, 216 P. 96, 97, it is held that although the general rule is as hereinbefore has been indicated, "evidence of other crimes is competent to prove the specific crime charged when it tends to establish intent." But in the instant case, other than the fact that in the circumstances the child had been seated on his lap, defendant denied that any improper act on his part had taken place. No issue of "innocent intent" was involved.

[4] On the trial of an action wherein the defendant therein is charged with the commission of "a lewd and lascivious act upon and with the body of * * * a female child under the age of fourteen years," it should require neither argument nor authority to establish, if not to demonstrate, the prejudicial effect on the defense of evidence of the nature of that here under consideration. Such an offense is so revolting to one's sense of morals or decency that, with the laity at least, in itself, the fact that such a charge has been made affords strong evidence of the guilt of the person accused. Although even with common knowledge of the usual unreliability of statements that are made by imaginative small children, ordinarily stories that are told by them in which improper sexual conduct of men, of whatever nature such asserted conduct may be, is charged, are unhesitatingly accepted as true. In that connection, general observation leads to the conclusion that testimony given by the accused, however upright may have been his daily conduct, and commendable his general reputation within the knowledge of lifelong and intimate friends, usually goes for naught. At most, his sworn statements create no more than a conflict in the evidence. From a practical standpoint, he is helpless under such an accusation, with the result that his conviction usually follows. It is for such and similar reasons that the courts are so hesitant about admitting, especially in the case in chief, evidence of the commission by defendant of other offenses of a nature similar to that of which the defendant has been charged. Even in criminal cases other than those which involve sexual relations, the ordinary rule is applied, and is the result of recognition of the fact that prejudice to the defendant may, and usually does, follow from evidence that at some time in the past he has committed some other felony. Like most rules, that rule has its exceptions. But where no excep-

tion to the general rule is applicable, the courts have unhesitatingly announced that for a violation of such rule a new trial must be granted. In People v. Martin, 13 Cal.App. 96, 108 P. 1034, 1038, in treating of the seriousness of such an error, in part, it was said: "Its character was such as to greatly prejudice the defendant with the jury. * * * When, as in this case, irrelevant testimony has been admitted, and is of such a character as necessarily to be prejudicial to defendant, a new trial must be granted." In People v. Canfield, 173 Cal. 309, 159 P. 1046, 1047, it was held that "the introduction of testimony regarding a distinct felony was a serious error, which must have tended to prevent him [the defendant] from having a fair trial." And in People v. Anthony, 185 Cal. 152, at page 158, 196 P. 47, 49, it was said: "In view of the fact that jurors instantly perceive the probative value of such improper testimony and are also unfortunately inclined to attach weight to the insinuations or suggestions of counsel as to the proof in his possession, which is excluded by the rules of law enforced by the court, it is clear that, however good the intentions of the jury, or however sincere they may be in endeavoring to follow the instructions of the court to disregard such suggestions, it is well-nigh inevitable that they should give weight to such suggestions. It is true that the asking of a question is neither proof of the fact nor a declaration of its truth. Where, however, a series of questions were asked, as they were here, each suggesting to the court and to the jury that the district attorney was advised that this man was guilty of lewd and lascivious conduct with numbers of his young female charges, and that he had had sexual intercourse with several of them, one as young as 9 years, it is a psychological impossibility for the jury to wholly eradicate the impression made by such questions from their minds in weighing the evidence as to the guilt or innocence of the defendant on the particular item charged. * * * A district attorney is charged with the public duty of seeing that the defendant has a fair trial. The jury is aware of this fact and must have assumed that he had information which justified the question. The question of the district attorney asked of the defendant amounted to a charge against the defendant that he had been guilty of the offense of rape committed upon two small girls in his custody. The human mind is not so constructed that a thing of that kind can be either forgotten or overlooked by a jury."

Finally, on this phase of the question, the comment accredited to Sir Matthew Hale (1 Hale P.C. 635, 636), as it appears in 52 Corpus Juris 1087, seems particularly appropriate: "The courts have repeatedly approved Sir Matthew Hale's statements in regard to the crime of rape, that 'it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent'; and that we should 'be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses.' "

[5] Although the instant case was tried by the court sitting without a jury, the record presents satisfactory, if not conclusive, evidence of the fact that the criticized testimony that was erroneously admitted in evidence carried great weight with the trial judge. In his oral summary of the evidence, which was made after argument by respective counsel and immediately preceding his finding of "guilt" of defendant, it appears that the trial judge made the following statements: "Passing from her (the prosecuting witness) a moment, the next little girl—which of course is no issue here, other than the reflection on the probabilities of the case by her story—her story was straightforward. There is nothing there whereby we can challenge it except the fact, as suggested, that she made no complaint about it until a long time afterwards. We do not know, of course, the minds of children, but, in view of all of the circumstances of her story, it is difficult to conceive that she just made it up out of whole cloth, for any reason whatever. So far as the other little girl is concerned, she adds not much to the case. It was a long time ago, and the only thing which we could derive from that is that there must have been some question somewhere which brought the little girl into the picture, that would indicate at least some association with a child, which is not

normal. * * * Can we say, in view of all of it that that is necessarily sufficient ground to repudiate the stories of these children, unrelated, not there together, no apparent opportunity for working this thing up in any particular? I think it would be asking too much to go that far and disregard the stories of these witnesses for that reason alone. * * * We appreciate very keenly the seriousness of a situation of this kind, but it would be doing violence to our own better judgment if we were to go so far as to entirely disregard the testimony of—well, all of the parties in this case. * * *"

Notwithstanding the fact that appellant makes no point of it (for he is in no position to do), but as indicating additional improper influences which manifestly were given considerable weight by the trial judge, it is noted that the record also shows that as a part of defendant's case, the trial court received in evidence certain hearsay testimony which consisted in a conversation or conversations that had taken place in the absence and without the knowledge of defendant (1) between a sister of defendant and the mother of one of the children to whose testimony reference hereinbefore has been had; and (2) between the same sister of defendant and the foster or stepmother of the prosecuting witness. In reference to such hearsay testimony, the trial judge said: "May I refer in this connection to the testimony of Mrs. Merriweather—that is a rather interesting story. Nowhere did she get any language from Mrs. Curtis or Mrs. Jensen, for that matter, which constituted a contradiction or a statement that they didn't believe the stories. They responded, as generous people might under the circumstances, to a relative of the defendant who was in serious trouble, passing it up to them; but just why would Mrs. Merriweather, under all of these circumstances, talk about leniency? That is a strange reaction to the situation there. If she believed that this was a frameup and that there was absolutely nothing to it, I don't see any occasion for talking about leniency, and yet she says she did mention that to one of these women. * * *"

With reference to the nature of the objections here interposed by appellant, and which hereinbefore have been quoted, respecting alleged error by the trial court in admitting the criticized testimony in evidence, respondent registers no objection; but even though respondent had here objected to a consideration by this court of the particular objections to the admission of such evidence that are now urged by appellant, former rulings by the appellate tribunals of this state with reference to such a situation appear to indicate that if such evidence was "absolutely or manifestly incompetent," and appellant is entitled to have that fact considered on appeal from the judgment" (2 Cal.Jur. 269; Fabian & Co. v. Callahan, 56 Cal. 159); and in principle, as is otherwise stated in the same volume of California Jurisprudence at page 273, "where the objection cannot be met, no matter how specific, a specific objection is not necessary" (citing Morehouse v. Morehouse, 140 Cal. 88, 73 P. 738; Lemly v. Doak Gas Engine Co., 40 Cal.App. 146, 180 P. 671).

In the case of People v. Anthony, 185 Cal. 152, 196 P. 47, 50, to which reference hereinbefore has been had, and in which case the misconduct of the district attorney in presenting evidence or in making suggestions respecting "other crimes" was the special subject of consideration by the Supreme Court, in part, the opinion contains the following: "But the good faith of the district attorney in a case of this kind in asking questions that are clearly improper does not take away from the question the prejudicial effect resulting to the defendant. The real question is: *Has the defendant had a fair trial?* [Italics added.] It is clear under the circumstances of this case where the evidence and the conflicting considerations are so evenly balanced, that, if the jury attached the slightest weight to the innuendoes of the district attorney, this weight might be sufficient to turn the scales."

[6] And so in the instant case: It is apparent that in reaching his conclusion that defendant was guilty of the offense of which he was charged, the erroneously admitted evidence constituted a vital element in the mind of the trial judge, and that as a consequence, in legal contemplation, defendant did not have a fair trial.

The judgment is reversed and the cause is remanded for a new trial.

We concur: YORK, J.; DORAN, J.

21 Cal.App.2d 320

PEOPLE v. HAYES.

Cr. 2972.

District Court of Appeal, Second District, Division 2, California.

June 9, 1937.

Hearing Denied by Supreme Court July 9, 1937.

1. Criminal law 🔑517(1)

A confession voluntarily made by defendant is properly received in evidence.

2. Criminal law 🔑662(4)

In manslaughter prosecution, sound moving picture of defendant making voluntary confession to police officer was admissible, as against contention that he was denied right to be confronted in presence of court by witnesses against him.

3. Witnesses 🔑266

In manslaughter prosecution, sound moving picture of defendant making voluntary confession to police officer was admissible, as against contention that he was denied right to cross-examine witnesses who testified against him.

4. Constitutional law 🔑206(1)

In manslaughter prosecution, sound moving picture of defendant making voluntary confession to police officer was admissible, as against contention that he was denied privileges and immunities secured to him by state Constitution.

5. Witnesses ⟹227

In manslaughter prosecution, sound moving picture of defendant making voluntary confession to police officer was admissible, as against contention that it was unsworn testimony.

6. Criminal law ⟹419(1)

In manslaughter prosecution, sound moving picture of defendant making voluntary confession to police officer was admissible, as against contention that it was hearsay evidence.

7. Constitutional law ⟹266
Criminal law ⟹393(1)

In manslaughter prosecution, sound moving picture of defendant making voluntary confession to police officer was admissible, as against contention that it compelled defendant to be a witness against himself contrary to due process clause of federal Constitution, state Constitution, and state Penal Code (Pen. Code, §§ 688, 1323 as amended by St.1935, p. 1942; Const. art. 1, § 13; Const.U.S. Amend. 14).

8. Criminal law ⟹736(2)

Where, after preliminary examination, trial judge is satisfied that sound moving picture of confession accurately reproduces confession and that it was freely and voluntarily made without hope of immunity or promise of reward, the preliminary foundation and sound moving picture should go to jury.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Robert Hayes was convicted of manslaughter, and he appeals.

Judgment affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of manslaughter. This appeal is from the judgment and order denying defendant's motion for a new trial.

The essential facts are these:

During the course of the trial the court permitted a sound motion picture of defendant making a confession to certain police officers to be reproduced before the jury and received as evidence.

Defendant relies for reversal of the judgment on the sole proposition that *it was prejudicially erroneous for the trial court to receive as evidence a sound motion picture of defendant making a confession to police officers.*

[1-7] This proposition is untenable. The law is settled that the confession of a defendant voluntarily made is properly received in evidence. People v. Ford, 25 Cal.App. 388, 419, 143 P. 1075; 8 Cal.Jur. 108, § 200. Hence, there is no merit in defendant's objections that the introduction in evidence of his confession by means of a sound moving picture was error because:

(1) It denied him

(a) the right to be confronted in the presence of the court by witnesses against him,

(b) the right to cross-examine the witnesses who testified against him,

(c) the privileges and immunity secured to him by the Constitution of the state of California.

(2) It was

(a) unsworn testimony,

(b) hearsay evidence.

(3) It compelled the defendant to be a witness against himself contrary to the "due process" clause of the Fourteenth Amendment of the Constitution of the United States of America and to the provisions of section 13, article 1, of the Constitution of the State of California and of section 688 of the California Penal Code and section 1323 as amended by St.1935, p. 1942.

(4) It was in violation of the Fourteenth Amendment of the Constitution of the United States of America.

Therefore, the single question for our consideration is: Should a defendant's voluntary confession be reproduced to the jury through the medium of a sound moving picture?

[8] We are satisfied that it should, and that it stands on the same basis as the presentation in court of a confession through any orthodox mechanical medium, that is, there is a preliminary question to be determined by the trial judge as to whether or not the sound moving picture is an accurate reproduction of that which it is alleged occurred. If after a

preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done, and the other requirements relative to the admissibility of a confession are present, i. e., it was freely and voluntarily made without hope of immunity or promise of reward, then, not only should the preliminary foundation and the sound moving picture go to the jury, but, in keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice is to be commended as of inestimable value to triers of fact in reaching accurate conclusions.

This particular case well illustrates the advantage to be gained by courts' utilizing modern methods of science in ascertaining facts. The objection is frequently heard in criminal trials that a defendant's confession has not been freely and voluntarily made, he testifying that it was induced either by threats or force or under the hope or promise of immunity or reward, which is denied by witnesses on behalf of the People. When a confession is presented by means of a movietone the trial court is enabled to determine more accurately the truth or falsity of such claims and rule accordingly.

The conclusion we have reached finds support in Commonwealth v. Roller (1930) 100 Pa.Super. 125. The court in this case held on a similar state of facts that a movietone confession of a defendant was properly received in evidence. See, also, Wigmore on Evidence, volume II (second Edition) p. 109, wherein that learned author says: "But where the moving picture is taken *without artificial reconstruction,* i. e., at the time and place of the original event (a possibility not infrequent), it lacks the above element of weakness, and is entitled to be admitted on the same principles as still photographs. The only circumstance then to be considered is that in a few matters, such as speed and direction of human movement, or relative size in the focus, the multiple nature of the films requires special allowances of error to be made; but these allowances are no different in kind from the elements of error inherent under certain conditions in still photographs."

For the foregoing reasons the judgment and order are, and each is, affirmed.

I concur: CRAIL, P. J.

WACHS v. WACHS.*

Civ. 10334.

District Court of Appeal, First District, Division 2, California.

Aug. 31, 1937.

Hearing Granted by Supreme Court Oct. 28, 1937.

1. Appeal and error 🔑1008(3)

Where question is whether uncertainty or ambiguity exists in contract is one of law, lower court's findings on issue are not binding on appeal.

2. Evidence 🔑455

Where contract for dissolution of real-estate partnership provided for payment of commissions when any transaction leading to a commission was closed as to certain persons named in schedule, and word "transaction" may have implied something more than sale, lease, or contract, parol evidence was admissible to aid in interpretation of contract.

The word "transaction" embraces within its meaning the doing or performing of any business or negotiation or negotiations affecting property rights, contracts, agreements, and the negotiations resulting in contracts and agreements and in transfer of titles.

[Ed. Note.—For other definitions of "Transaction," see Words & Phrases.]

3. Evidence 🔑458

Where words of contract consistently admit of two interpretations, according to subject-matter in contemplation of parties, parol evidence may be admitted to show circumstances under which contract was made and subject-matter to which parties referred (Civ.Code, § 1647; Code Civ.Proc. § 1860).

4. Evidence 🔑458

In action on contract of dissolution of real-estate partnership for share of commissions under provision of contract providing for payment of commissions, when any transaction leading to commission was closed as to any person on certain schedule, meaning of word "transaction" made contract susceptible of various interpretations and trial court should have permitted plaintiff to plead and prove surrounding circumstances for purpose of aiding court in interpreting contract of parties and not for purpose of varying terms of contract (Civ. Code, § 1647; Code Civ.Proc. § 1860).

---

*For subsequent opinion see 79 P.2d 1085.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Action by Harold Wachs against Lionel Wachs. Judgment for the defendant, and plaintiff appeals.

Reversed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent.

SPENCE, Acting Presiding Justice.

Plaintiff brought this action upon a contract seeking to recover a share of certain commissions claimed to be due him under the terms of said contract. From a judgment in favor of defendant, plaintiff appeals.

For approximately ten years prior to October 1, 1931, plaintiff and defendant had engaged in the real-estate business as copartners under the name of "Wachs Bros." A dissolution agreement was entered into as of that date. There was a paragraph in said agreement entitled "Good Will" which read in part as follows:

"It is contended by Harold Wachs that there is a good will which appertains to the partnership and that upon the dissolution thereof compensation should be made to Harold Wachs by Lionel Wachs. Attached hereto is a list called Schedule 10 of the persons with whom Wachs Bros. have been in contact during the life of the partnership and to whom maps, letters and other literature have been sent. * * * Lionel Wachs hereby agrees to pay to Harold Wachs out of the commissions earned from any transactions consummated on or before October 1, 1934, a sum not to exceed $2,500, which sum shall be payable as follows: When any transaction leading to a commission is closed as to any persons on said Schedule 10. * * * Lionel Wachs agrees to pay 25% thereof to Harold Wachs, within thirty days after the receipt thereof, until the sum of $2,500 has been paid."

In his complaint, plaintiff alleged among other things "That the persons listed on said Schedule 10, by reason of their ownership of property, or interests in property, or their contacts with owners of property, or owner of interest in property, were persons with or through whom future patronage was anticipated by said partnership." These allegations of the complaint were stricken out upon motion of defendant.

On the trial, plaintiff made an offer of proof to which an objection was sustained by the trial court. It appeared that approximately 200 persons were named on said Schedule 10. It was stated in the contract that said schedule contained a list of "*the persons* with whom Wachs Bros. have been in contact during the life of the partnership." (Italics ours.) (A perusal of the list shows that, with four or five exceptions, it was made up entirely of the names of natural persons rather than of corporations or partnerships. The addresses of said persons were listed, which addresses in numerous cases were listed as in care of some bank, investment company, chain store corporation, or other commercial institution. These companies were not otherwise listed on said Schedule 10. Plaintiff's offer was made in great detail but it may be briefly summarized. He offered to prove that approximately 50 persons named on said list were either officers, agents, or employees of certain principals such as banks, investment companies, chain store corporations, or other commercial institutions, and that said persons had acted for and on behalf of their respective principals in dealing with the partnership as real-estate brokers prior to the dissolution; that the partnership had never had any transactions with said 50 persons in their individual capacities but had had numerous transactions with them in their respective representative capacities, which transactions had resulted in the payment of commissions to the partnership. It was stated that said offer of proof was made to show the capacities in which said persons had acted in dealing with partnership prior to its dissolution and to place before the trial court the circumstances surrounding the making of the contract in order to enable the trial court to determine the meaning of the words "When any transaction leading to a commission is closed as to any persons on said Schedule 10," as used in said contract. It was stipulated by the parties that after the dissolution and between October 1, 1931, and October 1, 1934, transactions were had with certain persons named in said offer of proof and in said Schedule 10 in their representative capacities and on behalf of their said principals, and that said transactions resulted in net commissions paid to defendant Lionel Wachs in a sum in excess of $8,000. This action was brought to recover a portion of said last-mentioned commissions.

Appellant contends that the trial court erred in granting the motion to strike and in sustaining the objection to the offer of proof, and therefore the judgment should be reversed. In our opinion, this contention must be sustained.

[1] The parties agree upon the general principles of law applicable in determining the admissibility of parol evidence in connection with written contracts, but they disagree upon the question of whether such evidence was admissible here. It is conceded that the question involved is whether the language "When any transaction leading to a commission is closed as to any person on said Schedule 10," as used in said contract, is clear and explicit or whether said language involves such an uncertainty as to permit the introduction of parol evidence in aid of the interpretation thereof. It is further conceded that "the question whether an uncertainty or ambiguity exists is one of law, and the lower court's finding on this issue is not binding on appeal." Brant v. Calif. Dairies, Inc., 4 Cal. (2d) 128, 133, 48 P.(2d) 13, 16. We are of the opinion that, owing to the various senses in which the word "transaction" may be used, such an uncertainty existed in the language employed in the contract here as to permit the introduction of the parol evidence offered.

[2] The word "transaction" may imply something more than sale, lease, or contract as used in the contract before us. It has been stated that said word embraces within its meaning "the doing or performing of any business" [2 Bouvier's Law Dictionary, Rawle's Third Revision, p. 2331]; "negotiation" [United States v. Pan American Petroleum Co. (C.C.A.) 55 F.(2d) 753]; "negotiations affecting property rights, contracts, agreements, and the negotiations resulting in contracts and agreements, and in the transfer of titles." [Tanner v. State, 161 Ga. 193, 130 S.E. 64, 66.] Other definitions may be found in the authorities of which we need cite but a few. Stephens v. Short, 41 Wyo. 324, 285 P. 797; Bright v. Virginia, etc., Co. (C.C.A.) 270 F. 410; Southeastern Life Ins. Co. v. Palmer, 120 S.C. 490, 113 S.E. 310; Wilson v. Wilson, 83 Neb. 562, 120 N.W. 147. Perhaps the word "transaction" is such a word as was in the mind of Mr. Justice Holmes when he said, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372, L.R.A.1918D, 254.

[3, 4] What then is the meaning, or the "color and contents", of the word "transaction" as used in the contract before us? Should the phrase in question be interpreted to mean "when any sale, lease or contract leading to a commission is closed as to any person on said Schedule 10," or should it be interpreted to mean "when any negotiation (doing of any business) leading to a commission is closed as to any person on said Schedule 10." If the first suggested meaning be given to the word "transaction," then perhaps, the language should be restricted to those cases in which sales, leases, or contracts leading to commissions were closed as to the persons named on Schedule 10 as principals. If the second suggested meaning be given, then the language is broad enough to include those cases in which the negotiations leading to a commission were closed as to the persons on said Schedule 10 either as principals or as representatives of others. It cannot be said from a reading of the contract whether the word "transaction" was intended to convey the first or second meaning above suggested. It is one of those contracts where the words "consistently admit of two interpretations, according to the subject matter in contemplation of the parties" and in which "parol evidence might be admitted, to show the circumstances under which the contract was made and the subject matter to which the parties referred." Jenny Lind Co. v. Bower & Co., 11 Cal. 194, 198; see, also, McNeny v. Touchstone, 7 Cal. (2d) 429, 60 P.(2d) 986; Civ.Code, § 1647; Code Civ. Proc. § 1860. The trial court should therefore have permitted appellant to plead and prove the surrounding circumstances, not for the purpose of varying the terms of the written instrument, but for the purpose of aiding the court in interpreting the contract of the parties as embodied in the written instrument.

The judgment is reversed.

We concur: STURTEVANT, J.; JOHNSTON, Justice pro tem.

In re BELDON'S ESTATE.*

DePARCQ et al. v. O'BRIEN et al.

Civ. 2030.

District Court of Appeal, Fourth District, California.

Aug. 27, 1937.

Hearing Granted by Supreme Court Oct. 25, 1937.

1. **Wills 🔑448**

When a patent ambiguity appears on face of a will, the instrument is to be construed, when reasonably possible, so that intestacy will be avoided (Probate Code, § 102).

2. **Wills 🔑448**

Rule that when a patent ambiguity appears on face of a will, the instrument is to be construed, when reasonably possible, so that intestacy will be avoided may be applied only when it is manifest that there is need for interpretation, since if language of instrument is clear and unambiguous, the necessity of judicial construction does not arise (Probate Code, § 102).

3. **Wills 🔑440**

Where no ambiguity in phraseology exists, the intention of the testator is to be discovered in the express language which he used.

4. **Wills 🔑456**

Employment by a testator of language that is clear and certain affords no justification for wresting an unnatural meaning therefrom to save a will from condemnation, however beneficial the testator's unexpressed intention may have been.

5. **Wills 🔑449**

Indulgence in speculation and conjecture as to what a testator's intention was affords no proper basis for a decree of distribution, and a court is not permitted to adopt a construction founded on a conjecture or to supply an omission by rewriting a will in order to avoid a conclusion of partial intestacy.

6. **Wills 🔑525**

Under will leaving "to the legal descendants of Roberts (Pat) Nellies 3 children Rosemary & Will & Frances & His 2 Grandchildren 15 percent of the balance of my estate and 10 percent to Mikes son" there being two surviving sons of "Roberts (Pat)", 15 per cent. of residue of estate was to be distributed to the seven persons designated immediately preceding the words "15 percent of the balance of my estate" and 10 per cent. to person designated as "Mikes son," notwithstanding such disposition left an intestacy as to part of residue (Probate Code, § 102).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of D. W. Beldon, also known as David William Beldon, deceased, with respect to the controversy between Mrs. Rose DeParcq and another, and William J. O'Brien and others, as to the construction of certain language contained in the testator's holographic will, on proceedings for final distribution of the estate. From a specified portion of the decree for final distribution of the estate, Mrs. Rose DeParcq and another appeal.

Reversed.

Dempster McKee, Charles Fox, Jr., and Dwight D. Bell, all of San Diego, for appellants.

E. Swift Torrance and Wright, Monroe, Thomas & Glenn, all of San Diego, for respondents.

JENNINGS, Justice.

This appeal, which has been taken from a specified portion of a decree of final distribution of an estate, has to do with the construction of certain language contained in a holographic will.

The will in its entirety is as follows:

"San Diego Calif. June-8-1934

"I D W Beldon David William Beldon in sound mind & Good Health do Declare this to Be my last will & Testamenth all previous wills are hereby Revoked to my sister Rose now Mrs. H. W. Deparcq of Staples Minnesota I will & Bequeath $30000 thirty thousand Dollars in event of her death Before mine this Bequest goes to her crippled son William—to the Masonic Lodge Arizona No. 2 Phoenix Ariz of which I am a member $1000 one thousand Dollars for their charity fund & to the Elks Lodge No. 335 B. P. O. E. Phoenix Arizona of which I am also a member 500.00 500 dollars for their charity fund. My sister Rose is hereby appointed administratix & executrix without Bonds of this will, to the legal Descendants of Roberts (Pat) Nellies 3 children Rosemary & Will & Frances & His 2 Grandchildren 15 percent of the balance of my estate and 10 percent to Mikes son. after all my just Debt are paid anyones who tries to interfere with the purpose & intent of this will shall Be cut off with an allowance of not over $1.00 inheretance under this will.

"D. W. Beldon
"David William Beldon."

That portion of the will which is material to the present proceedings consists of the following language: "to the legal descendants of Roberts (Pat) Nellies 3 children Rosemary & Will & Frances & His 2 Grandchildren 15 percent of the balance of my estate and 10 percent to Mikes son."

During the trial, evidence as to which there is no dispute was produced which disclosed the following facts: The testator was unmarried and left surviving him no issue. His true name was David William O'Brien, but, during the latter years of his life, he had assumed the name of Beldon and was known as David William Beldon. His death occurred on December 5, 1934. At this time, his heirs at law consisted of one sister, Rose DeParcq, two children and two grandchildren of a brother, Pat, who had died in 1908, three children of his sister Nellie, who had died in 1911, and the son of his brother, Michael, who had died in 1916.

There is here no dispute as to the identity of the persons named in the above-quoted provision of the will. They are the two surviving sons of Patrick O'Brien and his two grandchildren, the three surviving children of the testator's deceased sister, Nellie, and the son of his deceased brother, Michael.

The trial court construed the last-quoted language of the will to mean that each nephew and niece of the testator with the exception of William Loftus O'Brien, the son of Michael O'Brien, should receive 15 per cent. of the residue of the estate, that Patrick's two grandchildren should each receive 7½ per cent. of the residue and William Loftus O'Brien, who was particularly designated as "Mikes son" should receive 10 per cent. of the residue. The decree of final distribution was drawn in conformity with this construction, and, from that portion of the decree which allots the residue of the estate in the proportions indicated, the testator's sister, Mrs. Rose DeParcq, and his nephew, William Loftus O'Brien, have appealed.

[1, 2] It is apparent that the trial court, in construing the will as it did, was constrained so to do in order to avoid a conclusion of partial intestacy. Section 102 of the Probate Code and numerous authorities emphasize the desirability of so interpreting wills as to prevent intestacy either total or partial. The principle may be regarded as settled therefore that, when a patent ambiguity appears on the face of a will, the instrument is to be construed, when reasonably possible, so that intestacy will be avoided. Hoytema's Estate, 180 Cal. 430, 181 P. 645. However, in order that this familiar and salutary rule of construction may be applied, it is manifest that there must be need of interpretation. If the language of the instrument is clear and unambiguous, the necessity of judicial construction does not arise. Estate of Johnson, 107 Cal.App. 236, 290 P. 314.

[3-5] In the provision under consideration the expression "15 per cent of the balance of my estate" presents no uncertainty or ambiguity. The quoted language is plain and definite. It may be that the testator intended that the seven persons, whom he designated immediately preceding the statement "15 per cent," should take 90 per cent. of the residue. He did not, however, give expression to such an intention, and it is a cardinal rule of construction that, where no ambiguity in phraseology exists, the intention of the testator is to be discovered in the express language which he used. Ryan's Estate, 191 Cal. 307, 216 P. 366. As was said in Estate of Ogden, 78 Cal.App. 412, at page 414, 248 P. 680, 681, "the question for the court to determine is not what she intended to declare in her will, but what she intended by what she did declare therein." Employment by a testator of language that is clear and certain affords no justification for wresting an unnatural meaning therefrom to save a will from condemnation, however beneficial the testator's unexpressed intention may have been. Doane's Estate, 190 Cal. 412, 213 P. 53. Indulgence in speculation and conjecture as to what a testator's intention was affords no proper basis for a decree of distribution [Estate of Zilke, 115 Cal.App. 63, 1 P.(2d) 475], and a court is not permitted to adopt a construction founded on conjecture or to supply an omission by rewriting a will in order to avoid a conclusion of partial intestacy [Estate of Hisey, 106 Cal.App. 678, 289 P. 889].

[6] We are therefore impelled to the conclusion that the trial court incorrectly construed the hereinabove quoted language of the will. Whatever intention the testator may have had with respect to the disposition of the residue of his estate, the plain mean-

ing of the language which he employed is that 15 per cent. of such residue shall be distributed to the seven persons whom he designated immediately preceding the words "15 per cent of the balance of my estate," and 10 per cent. of such residue to the person designated as "Mikes son."

The portion of the decree from which the appeal has been taken is reversed.

We concur: BARNARD, P. J.; MARKS, J.

---

22 Cal.App.2d 510

COFFEY v. LOS ANGELES FIREMAN'S RELIEF ASS'N, Inc., et al.

Civ. 11475.

District Court of Appeal, Second District, Division 2, California.

Sept. 3, 1937.

1. Mandamus ⚷125

A state court will not issue a writ of mandate, directing restoration of person to membership in fraternal or benevolent society, in absence of showing that expelled member has first pursued and exhausted all remedies afforded by by-laws and constitution of order for restoration to membership.

2. Beneficial associations ⚷11

Where expelled member of firemen's relief association failed to allege and prove that he had exhausted lawful remedies prescribed by constitution and by-laws of association for reinstatement, refusal of court to order expelled member's reinstatement was proper.

3. Appeal and error ⚷907(3)

On appeal on judgment roll alone from judgment denying expelled member of association reinstatement to membership, finding that expelled member had not exhausted means of reinstatement provided by association was conclusive and was assumed to be supported by substantial evidence.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Stephen J. Coffey against the Los Angeles Fireman's Relief Association, Incorporated, and others. Judgment for the defendants, and plaintiff appeals.

Affirmed.

John S. Cooper, of Los Angeles, for appellant.

Ivan Miller, of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiff appeals on the judgment roll alone from a judgment in favor of defendants after trial before the court without a jury in an action requesting his reinstatement to membership in the defendant Los Angeles Fireman's Relief Association, Incorporated, hereinafter referred to as defendant association.

The material facts are these:

April 10, 1934, defendant association expelled plaintiff from membership for nonpayment of dues. Thereafter on April 10, 1935, the superior court on application of the plaintiff ordered said defendant to restore plaintiff to membership in its relief department, but denied his application for restoration to membership in the life and accident department thereof.

September 25, 1935, said defendant again expelled plaintiff from membership in its relief department on charges of unbecoming conduct. Subsequently, plaintiff's application for reinstatement to membership in the relief department of defendant association was denied by the superior court, and the present judgment was entered. The trial court made, among others, the following finding:

"That plaintiff did not, at any time thereafter, present to or file with the defendant association, or the officers, trustees or directors thereof, any application for reinstatement as provided by the By-Laws of said association."

This is the sole question presented for determination:

To entitle plaintiff to the issuance of a writ of mandate restoring him to membership in defendant association, was it necessary for him to allege and prove that he had exhausted the lawful remedies prescribed by the constitution and by-laws of said association for reinstatement?

[1] This question must be answered in the affirmative. The law is settled that a state court will not issue a writ of mandate, directing the restoration of a person to membership in a fraternal or benevolent society,

in the absence of a showing that the expelled member has first pursued and exhausted all of the remedies afforded by the by-laws and constitution of the said order or society for restoration to membership therein. Neto v. Conselho Amor, etc., 18 Cal.App. 234, 238, 122 P. 973; Lawson v. Hewell, 118 Cal. 613, 621, 50 P. 763, 49 L.R.A. 400; 19 Cal.Jur. 509, § 36 (1925).

[2, 3] It is apparent that plaintiff has failed to comply with the foregoing rule, inasmuch as the trial court found that plaintiff had not presented or filed with the defendant association or the officers, trustees, or directors thereof any application for reinstatement as provided by the by-laws of said association. This finding is conclusive here and we must assume that it was supported by substantial evidence, since the appeal is on the judgment roll alone. Delanoy v. Delanoy, 216 Cal. 23, 26, 13 P.(2d) 513. Therefore, the trial court properly entered judgment in favor of defendants.

The foregoing conclusion makes it unnecessary for us to discuss the other points raised by plaintiff in his brief.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

---

22 Cal.App.2d 472

Ex parte FERRIGNO.

Cr. 1984.

District Court of Appeal, First District, Division 1, California.

Aug. 31, 1937.

1. Judgment 🔑91

A consent judgment, being regarded as a contract between the parties, must be construed as any other contract.

2. Judgment 🔑91

Where a consent judgment admits of two constructions, the whole record will be examined, and that construction will be adopted that is consonant with the judgment that should have been rendered.

3. Injunction 🔑223(1)

Where macaroni manufacturer, against whom an action was brought by the California Macaroni Industry Board to restrain manufacturer from selling his products for less than price set pursuant to marketing agreement statute, consented to a judgment granting injunction against him, such judgment did not authorize an order imprisoning manufacturer for failing to pay assessment imposed because of his price cutting in view of board's stipulation waiving rights that accrued prior to judgment (St.1935, p. 1856).

4. Appeal and error 🔑843(1)

District Court of Appeal was not required to pass on contention of petitioner that was not necessary to a decision in his favor.

Proceeding in the matter of the application of G. Ferrigno for a writ of habeas corpus.

Writ granted, and petitioner discharged.

J. Thaddeus Cline, of San Francisco, for petitioner.

Mathew O. Tobriner, of San Francisco, for respondent.

Raymond D. Williamson, of San Francisco, for respondent Sheriff of City and County of San Francisco.

PER CURIAM.

Petitioner for some time previous to February 6, 1937, was engaged in the business of manufacturing macaroni, and was duly licensed as such by the director of agriculture of the State of California under the provisions of the California Marketing Agreement Act of 1935 (St.1935, p. 1856). On the above date the California Macaroni Industry Board of Northern California—which board was appointed under the act by the director—brought an action in the superior court of the city and county of San Francisco against petitioner, alleging that he had in violation of the act offered to sell and sold certain of his products for prices less than those set out in his price-list filed with the director pursuant to the act. The complaint prayed an injunction, restraining such violation, and for general relief.

Petitioner appeared, and by stipulation consented that a final judgment be entered against him as prayed. It was further stipulated, however, that the judgment should not provide for costs or pecuniary damages, such being waived by plaintiff;

that plaintiff should also waive any rights of action which it might have arising out of alleged violations of the marketing agreement and accruing prior to the date of the entry of the final judgment and the injunction therein to be provided for, and particularly not to commence any action or proceeding in its name or otherwise under any of the provisions of the marketing agreement which might be predicated upon such alleged violations. The decree, entered pursuant to the stipulation, provided that the petitioner be permanently enjoined and restrained from selling, offering for sale, marketing, or otherwise distributing any macaroni or macaroni products in the State of California, in violation of the provisions of the license for the macaroni industry of California issued by the director of agriculture on the 23d day of April, 1936. Subsequently an order issued, directing petitioner to show cause why he should not be punished for contempt for a violation of the judgment and injunction in that he "did so sell, offer for sale, market and otherwise distribute macaroni and macaroni products in the state of California in violation of the provisions of said license, without fulfilling the terms and requirements of said license, in that he failed to pay the assessment issued under and pursuant to the terms of said license, in the sum of $130."

Petitioner appeared in response to the order, and after hearing was adjudged guilty of contempt and ordered to be imprisoned in the county jail of the city and county of San Francisco until the above sum should be paid.

It is admitted that no sales or offers of sale were made in violation of the injunction, the sole ground for contempt being that the petitioner had failed to pay the assessment.

[1, 2] The rule is well settled that a consent judgment, being regarded as a contract between the parties, must be construed as any other contract (34 Cor.Jur. Judgments, § 337, p. 133); and, like an ordinary judgment, when it admits of two constructions, the whole record will be examined, and that construction will be adopted that is consonant with the judgment which should have been rendered under the facts and law of the case. Watson v. Lawson, 166 Cal. 235, 135 P. 961.

[3] In the present case, the pleadings, the stipulation, and the judgment clearly show that nothing was sought or granted other than injunctive relief against the sale of goods for prices less than those fixed by the price list filed with the director, and this being true there existed no ground for the order in question.

[4] It is also urged by petitioner that the act itself excludes from its provisions with respect to injunctive relief claims for assessments and fees, making these sums personal debts, collectible in ordinary suits at law. However this may be as it is our conclusion that the judgment included no claim of this character, it will be unnecessary to decide the question.

The petitioner is discharged.

22 Cal.App.2d 455

TRIGG v. ARNOTT et al.

Civ. 2015.

District Court of Appeal, Fourth District, California.

Aug. 28, 1937.

1. Bills and notes ⊂⇒116

A note is contract in writing and in event of ambiguity appearing on its face is to be construed as any other written contract.

2. Bills and notes ⊂⇒129(2)

Note which in first paragraph indicated that it was payable on demand and in second paragraph stated that it was conditional that principal sum mentioned in note should be paid in monthly installments of not less than specified sum to begin on certain date and payments to be made on corresponding monthly dates thereafter, and containing an acceleration clause and on which monthly payments had been made, taken as a whole, was an instrument payable in monthly installments and in case of default in payments became a demand note.

3. Bills and notes ⊂⇒129(2)

Note containing acceleration clause that in event of default in payment of interest or principal entire debt should become due and which was payable at option of holder indicated intention of parties that holder on default would have right to elect whether he would declare sum due and payable immediately.

4. Limitation of actions 🔑51(2)

The presence in a note of positive non-optional acceleration clause does not have self-operative effect so that statute of limitations begins to run immediately on happening of default in payment which note specifies shall be made on designated date (Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740).

5. Limitation of actions 🔑51(2)

Without affirmative action on part of holder of note containing optional acceleration clause, statute of limitations is not set in motion on default and creditor has full statutory period on any day of which he may of his own volition commence his action (Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740).

6. Limitation of actions 🔑51(2)

Action on note payable in installments was barred by limitations as to all installments which were due and unpaid for more than four years prior to commencement of action (Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740).

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by D. Trigg against Bessie Rountree Arnott, as executrix of the estate of John G. MacDonnell, deceased, and others. Judgment for defendants, and plaintiff appeals.

Reversed with directions.

Liggett & Liggett, of San Diego, and S. L. Fendel, of San Francisco, for appellant.

Richmond Jackson, of San Diego, for respondent M. C. MacDonnell.

JENNINGS, Justice.

On November 16, 1935, plaintiff instituted this action against the defendants to recover the sum of $1,857.29 principal and interest and $125 attorney's fee upon a promissory note. The answer of the defendant M. C. MacDonnell set up the defense that the cause of action alleged in the complaint was barred as to her by the statute of limitations—subdivision 1 of section 337 of the Code of Civil Procedure (as amended by St.1935, p. 1740). Trial of the action resulted in the entry of a judgment in favor of the above-mentioned defendant. The basis of the judgment is a finding made by the trial court sustaining the defense of the statute of limitations. From this judgment, plaintiff appeals.

The complaint alleged that the note was executed by John G. MacDonnell, who died on May 25, 1935, and whose estate is being administered by the defendant Bessie Rountree Arnott. The instrument was admitted in evidence during the trial and is in the following language:

"Waialua, March 5, 1931

"On demand after date, for value received, I promise to pay to The Bank of Hawaii, Ltd., or order, at its office in the above place, Eighteen Hundred & 00/100 Dollars ($1800.00) with interest thereon from date until fully paid, at 8% per annum net above taxes payable monthly.

"It is also conditioned that monthly installments shall be paid in sums of not less than $100.00 each, on the 5th day of April, 1931, and on the same date in each and every month thereafter, to be applied on principal.

"Principal and interest payable in U. S. Gold Coin or equivalent. In case of default in any payment of interest or principal the entire debt shall immediately become due and payable at the option of the holder hereof. Should any suit for collection be instituted the undersigned shall also pay the costs of collection including a reasonable attorney's fee.

"[Signed] John G. MacDonnell.

"The undersigned as endorsers jointly and severally hereby agree to all the terms of all obligations entered into by the maker hereof in this instrument, hereby waiving presentment, demand of payment, protest, notice of nonpayment and of substitution or change of securities, and consent to the extension hereof without notice.

"[Signed] M. C. MacDonnell.
"[Signed] Mrs. Margaret Crane."

[1, 2] It is apparent that if the note is simply a demand note, the trial court's finding that the cause of action based thereon is barred by the statute of limitations is correct and the judgment must be affirmed. O'Neil v. Magner, 81 Cal. 631, 22 P. 876, 15 Am.St.Rep. 88; Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009. It is our conclusion, however, that a proper construction of the language of the instrument indicates that it is not simply a note payable on demand. A

promissory note is a contract in writing and in the event of an ambiguity appearing on its face is to be construed as any other written contract. The instrument under consideration presents a patent ambiguity, since, although the first paragraph indicates that it is payable on demand, the second paragraph clearly states that "it is also conditioned" that the principal sum mentioned in the note shall be paid in monthly installments "of not less than $100.00 each," such monthly payments to begin on April 5, 1931, and to be made on the corresponding date of each and every month thereafter. The third paragraph contains an acceleration clause providing that "in case of default in any payment of interest and principal the entire debt shall immediately become due and payable at the option of the holder thereof." Taking the note in its entirety, it is clear that the instrument is one which is payable in specified monthly installments and that only in case of a default in such payments shall it be considered a demand note. Bank of America Nat. Trust & Savings Ass'n v. Schumacher, 6 Cal.App. (2d) 651, 45 P.(2d) 239. This conclusion is fortified by the practical construction which the parties to the contract themselves placed upon the language of the instrument since the note itself shows on its back that four monthly installments of $100 each were paid during the months of April, May, June, and July, 1931, and were duly credited on the principal of the note by the holder.

[3-5] Having arrived at the conclusion that the instrument which formed the basis of appellant's cause of action is not a simple demand note, it becomes necessary to consider the nature and legal effect of the acceleration clause contained within the third paragraph of the note. As above noted, this clause provides that in the event of a default in any payment of interest or principal, the entire debt shall immediately become due and payable "at the option of the holder hereof." The very language of this provision indicates that it was not the intention of the parties to the instrument that the acceleration clause should be self-operative, rendering the full amount of the note immediately due upon default in the payment of interest or of one of the monthly installments of principal without any affirmative action on the part of the holder of the note. On the contrary, the presence of the words "at the option of the holder" makes it evident that in case of default the holder should have the right to elect whether or not he would declare the entire sum represented by the note to be due immediately. It is settled in California that the presence in a promissory note of a positive nonoptional acceleration clause does not have a self-operative effect so that the statute of limitations begins to run immediately upon the happening of a default in a payment which the note specifies shall be made on a designated date. Belloc v. Davis, 38 Cal. 242; California Sav., etc., Soc. v. Culver, 127 Cal. 107, 59 P. 292; Congregational Church Bldg. Soc. v. Osborn, 153 Cal. 197, 94 P. 881; Andrews v. Zook, 125 Cal.App. 19, 13 P.(2d) 518. It is obvious that an acceleration clause which is optional in character cannot be regarded as self-operative since the parties to the contract have expressly and unequivocally conferred upon the holder of the instrument the right to elect whether or not he will exact the penalty which is exclusively for his benefit. Without some affirmative action on the part of the holder of a note containing an optional acceleration clause, the statute of limitations is not set in motion for the theory of the statute is that a creditor has the full statutory period, whatever that may be, on any day of which he may of his own volition commence an action. Hoff v. Funkenstein, 54 Cal. 233, 235; Barclay v. Blackinton, 127 Cal. 189, 193, 59 P. 834; Union Collection Co. v. Soule, 141 Cal. 99, 100, 74 P. 549; Bogart v. George K. Porter Co., 193 Cal. 197, 208, 223 P. 959, 31 A.L.R. 1045; People v. California S. Deposit Co., 41 Cal.App. 727, 730, 183 P. 289; Hinkel v. Crowson, 83 Cal.App. 87, 95, 256 P. 479.

[6] Since the note on which the present action was based was by its terms payable in monthly installments and it was also provided therein that interest on the principal amount of the note should be paid monthly, it follows that the cause of action was barred as to all installments of principal and interest which had become due more than four years prior to November 16, 1935, the date on which the action was instituted. Bissell v. Forbes, 1 Cal.App. 606, 82 P. 698; Vatcher v. Grier, 50 Cal.App. 39, 41, 195 P. 75. The undisputed evidence showed that on November 16, 1931, four installments of $100 each on account of principal were past due and that no interest which became due

after September 1, 1931, had been paid. As to the interest which was due and unpaid on November 16, 1931, and the four monthly installments of principal which became due on August 5, September 5, October 5, and November 5, 1931, the above-mentioned statute of limitations was a good defense. As to the remaining $1,000 of the principal of the note and interest which became due thereon after November 16, 1931, the action was not barred and appellant was entitled to recover such amounts together with such sum as the court should find to be reasonable as an attorney's fee in the action.

The judgment is accordingly reversed. On the going down of the remittitur herein, the trial court is directed to correct its findings and to enter judgment in conformity with the views herein expressed, including such amount as the court shall determine to be a reasonable attorney's fee. Appellant shall recover his costs of appeal.

We concur: BARNARD, P. J.; MARKS, J.

---

22 Cal.App.2d 448

CRAWFORD v. PACIFIC STATES SAVINGS & LOAN CO.

Civ. 11497.

District Court of Appeal, Second District, Division 2, California.

Aug. 27, 1937.

Hearing Denied by Supreme Court Oct. 10, 1937.

1. Negligence ⇨48

To impose liability for injury to invitee by reason of dangerous condition of premises, condition must have been known to owner or occupant or have existed for such time that it was duty of owner or occupant to know of it.

2. Innkeepers ⇨10

Invitee to hotel could not recover for damages for injuries resulting from fall by slipping on quantity of water on lavatory floor, where there was no evidence that owner of hotel had actual knowledge of such condition or that it had existed for such time that it was duty of owner to have noticed its existence.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Dorothy Crawford against Pacific States Savings & Loan Company. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Sidney A. Moss, of Los Angeles, for appellant.

Simon & Licker, David Licker, and Melvin Simon, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff, who was an invitee to defendant's hotel, for damages for injuries resulting from a fall by slipping on a quantity of water on the floor of the lavatory therein.

The contention of the defendant is that the judgment must be reversed for the reason that there is no evidence that the defendant had actual knowledge of the said condition, or that the condition complained of had existed for so long a time that the defendant is charged with notice of its existence. We find no such evidence in the record, nor is there any evidence to show how the water got on the floor. Gold v. Arizona Realty, etc., Co., 12 Cal.App.(2d) 676, 55 P.(2d) 1254.

In the case of Touhy v. Owl Drug Company, 6 Cal.App.(2d) 64, 66, 44 P.(2d) 405, 406, this court said: "The proprietor of buildings who directly or by implication invites others to go therein owes to such persons who thus enter a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils. He is not an insurer of such persons, nor does the mere occurrence of injury on such premises to such invitee create any presumption of negligence on the part of the proprietor. His responsibility is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. The true ground of liability rests on the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to invitees, over that of the invitee. Where such danger is obvious, or is as well known to the injured invitee as to the owner or occupant, there is no liability." Citing numerous cases.

[1] The general rule is stated in 45 Corpus Juris, 837, § 245: "In order to impose liability for injury to an invitee by reason of the dangerous condition of the premises the condition must have been known to the owner or occupant or have existed for such time that it was the duty of the owner or occupant to know of it." Citing the California case, Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793.

[2] The plaintiff does not cite us to any evidence in the record to sustain such essential element of his case. He refers us to cases where such knowledge was taken for granted, usually to cases where the dangerous condition was created by the defendant himself, or to cases which hold in effect merely that the fact that plaintiff fell on said floor is some evidence tending to show that a defective and dangerous condition existed thereon.

Judgment reversed.

We concur: WOOD, J.; McCOMB, J.

---

22 Cal.App.2d 733

In the Matter of the Application of Carl LANDOWITZ for a Writ of Habeas Corpus.

Cr. No. 1972.

District Court of Appeal, First District, Division 1, California.

Sept. 14, 1937.

Edward B. Dienstag and I. M. Peckham, both of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and William J. Connolly, Asst. Dist. Atty., both of San Francisco, for respondent.

Walter McGovern, of San Francisco, amicus curiæ for respondent.

PER CURIAM.

The questions presented in the above matter are essentially the same as those decided in Ex parte Kazas (Cal.App.) 70 P.(2d) 962, an application for a writ of habeas corpus; and on the authority thereof the petitioner is discharged.

---

22 Cal.App.2d 507

PEOPLE v. HAMMOND.

Cr. 505.

District Court of Appeal, Fourth District, California.

Sept. 2, 1937.

Hearing Denied by Supreme Court Sept. 30, 1937.

1. Criminal law ⚷977(3)

A waiver of statutory time for pronouncement of sentence against a defendant who had pleaded guilty to murder made by defendant's counsel and not defendant was sufficient (Pen.Code, § 1191).

2. Criminal law ⚷998

A motion to vacate a judgment must be presented to trial court within a reasonable time after rendition of judgment in order that it may be effective and within possibility of favorable action.

3. Criminal law ⚷998

A motion to vacate judgment pronounced on same day defendant had pleaded guilty to murder, based on ground that defendant's counsel's waiver of statutory time for pronouncement of sentence was ineffective which was not presented to the court until almost twenty years after entry of judgment was not made "within a reasonable time" after rendition of judgment and hence was ineffective (Pen.Code, § 1191).

[Ed. Note.—For other definitions of "Reasonable Time," see Words & Phrases.]

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

C. L. Hammond was convicted of murder on his plea of guilty on June 7, 1917. From an order of the Superior Court denying the defendant's motion to vacate the judgment, notice of which was given on March 30, 1937, the defendant appeals.

Affirmed.

C. L. Hammond, in pro. per.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

This appeal is from an order of the superior court of Fresno county denying defendant's motion to vacate a judgment of said court whereby defendant was sentenced to life imprisonment in Folsom prison. The record on appeal shows that the judgment was pronounced on June 7, 1917, and that on March 15, 1937, defendant gave notice that he would on March 30, 1937, move the court to vacate the judgment. The record further shows that the motion was actually submitted on June 18, 1937, and was denied on June 21, 1937.

[1] The single ground of the motion and the sole contention advanced on this appeal is that the trial court erroneously pronounced judgment on the same day on which defendant's plea of guilty to a charge of murder was entered. It is urged that the provisions of section 1191 of the Penal Code prohibited the court from pronouncing judgment at any time less than two days after the plea of guilt was entered, that consequently the trial court had no jurisdiction to take the action which it did, and hence that the judgment pronounced as above noted was void. It must, however, be observed that the record shows that the defendant was represented by counsel at the time judgment was pronounced against him and that his counsel expressly waived time for its pronouncement. Defendant contends that this is not sufficient to render the judgment immune to the attack made upon it for the reason that a waiver of the statutory time could only have been accomplished by the defendant himself. It was decided to the contrary in the case of People v. Manriquez, 188 Cal. 602, 606, 206 P. 63, 20 A.L.R. 1441.

[2, 3] Moreover, it may be regarded as settled that a motion of the character of that which was presented to the trial court in this proceeding must be made, "within a reasonable time" after rendition of judgment in order that it may be effective and within possibility of favorable action. People v. Vernon, 9 Cal.App.(2d) 138, 142, 49 P.(2d) 326. In the case last cited it appeared that more than four and one half years had elapsed after pronouncement of judgment when the motion for vacation was made and it was held that so long a delay was not reasonable and justified denial of the motion. In the very recent case of People v. Lumbley (Cal.Sup.) 68 P.(2d) 354, the defendant petitioned the trial court for the issuance of a writ of coram nobis whereby he sought to attack a judgment of conviction pronounced against him six years and eight months prior to institution of the proceeding for the writ. The trial court granted the petition and ordered the writ to issue. On appeal by the people the trial court's order granting the writ was reversed.

At page 358 of 68 P.(2d) the Supreme Court of California uses the following significant language:

"The untimely delay on the part of defendant in petitioning for the writ would have been sufficient grounds for denying it. In People v. Vernon, 9 Cal.App.(2d) 138, 19 P.(2d) 326, it is said that a motion to vacate a judgment must be made within a reasonable time. In that case the delay was shorter than in the present case, and the court held, under the circumstances of that case, delay had been so long as to justify a denial of the writ."

In the instant proceeding the delay which is wholly unexplained amounted to almost twenty years. This fact alone amply justified denial of the motion.

The order from which this appeal has been taken is accordingly affirmed.

I concur: MARKS, Acting P. J.

22 Cal.App.2d 501

BURT v. BAKER et al.

Civ. 11488.

District Court of Appeal, Second District, Division 2, California.

Sept. 1, 1937.

1. Landlord and tenant 🔑169(11)

In action for injuries sustained when tenant's heel caught on loose edge of stairway carpet causing her to fall, where tenant brought defect to attention of landlord's employee, 60 days before accident, and employee told tenant he would repair defect, whether tenant as reasonably prudent person was negligent in relying on employee's promise to repair defect was question for jury.

2. Appeal and error 🔑927(3)

On reviewing judgment predicated on motion for nonsuit, all presumptions, inferences, and doubtful questions must be construed most favorably to plaintiff.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Marie Burt against Mary A. Baker and others. Judgment for the defendants, and plaintiff appeals.

Reversed in part, and affirmed in part.

Victor Bewley and Samuel A. Rosenthal, both of Los Angeles, for appellant.

Bicksler, Parke & Catlin, Frank D. Catlin, and William E. Woodroof, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant after the trial court granted defendant's motion for a nonsuit in an action to recover damages for personal injuries, plaintiff appeals.

Viewing the evidence most favorable to plaintiff, as we must in reviewing a judgment predicated upon the granting of a motion for a nonsuit (Montgomery v. Nelson, 211 Cal. 497, 499, 295 P. 1034), the material facts are these:

November 29, 1935, at about 8:30 a. m., plaintiff, a tenant of an apartment owned by defendant Mary A. Baker, in whose employ the codefendant George A. Johnson was, while descending a stairway in the building in which her apartment was located, caught her heel on the loose edge of the stairway carpet, which caused her to fall and receive personal injuries. Approximately sixty days prior to the accident plaintiff had noticed the defect in the carpet and had called it to the attention of defendant Johnson, who in response to plaintiff's complaint told her that he would "fix it."

This is the sole question presented for determination:

Was plaintiff as a matter of law contributorily negligent?

[1] This question must be answered in the negative. There was a clear question of fact to be determined from all of the evidence by the trial court whether or not plaintiff as a reasonably prudent person was negligent in relying upon defendant Johnson's promise to fix the defective carpeting.

The rule of law is identical with and the facts are similar to those in Reuter v. Hill, 136 Cal.App. 67, 73, 28 P.(2d) 390, wherein it was held to be a question of fact for the determination of the jury whether the plaintiff acted as a reasonably prudent person in assuming that a janitor would keep his promise to remove excessive wax from a stairway upon which plaintiff subsequently fell and was injured.

[2] Applying to this case the settled law that on a motion for a nonsuit all presumptions, inferences, and doubtful questions must be construed most favorably to plaintiff (Richardes v. Richardes, 211 Cal. 392, 394, 295 P. 816), a finding that plaintiff acted as a reasonably prudent person in relying on defendant Johnson's promise to fix the defective carpet would have been sustained by substantial evidence. Plaintiff would not then have been contributorily negligent.

The record is devoid of any evidence upon which to predicate a judgment against the defendant Minnie E. Johnson.

For the foregoing reasons the judgments in favor of defendants Mary A. Baker and George A. Johnson are and each is reversed, and the judgment in favor of defendant Minnie E. Johnson is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

22 Cal.App.2d 442

MARTIN v. LEATHAM et al.

Civ. 11298.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1937.

Rehearing Denied Sept. 23, 1937.

Hearing Denied by Supreme Court Oct. 25, 1937.

1. Principal and agent ⟹158, 159(1)

A principal is liable to third persons not only for negligence of his agent in transaction of business of agency but also for frauds, torts, or other wrongful acts committed by such agent in and as part of the transaction of such business, even if the agent's act is willful and malicious and is unauthorized or contrary to principal's explicit instructions (Civil Code, § 2338).

2. Master and servant ⟹329

In action for death of person killed by employee of detective service while acting as special officer at skating pavilion, complaint alleging that pavilion operator employed detective service operator and that employee of detective service operator shot and killed victim at pavilion in course and scope of his employment, negligently, carelessly, and wantonly, and without good cause, stated a cause of action against both pavilion owner and detective service operator, notwithstanding use of word "wantonly" instead of "willfully and maliciously" (Civ.Code, §§ 2338, 2339).

3. Pleading 🔑129(1)
Allegations of a complaint which are not denied are deemed admitted.

4. Master and servant 🔑330(3)
In action for death of person killed by employee of detective service, who was hired to protect skating pavilion and to maintain order, evidence *held* sufficient to sustain finding that employee of detective service at time of the killing was an agent of skating pavilion operator (Civ.Code, § 2338).

5. Appeal and error 🔑1008(1)
In action for death of person killed by employee of detective service, who had been hired to protect skating pavilion and maintain order, when victim interfered in scuffle between employee and former patron who was trying to re-enter pavilion, whether employee wantonly killed victim and did not act in self-defense was for trial court.

6. Appeal and error 🔑1056(1)
In action for death of person killed by employee of detective service, who had been hired to protect skating pavilion and maintain order, when victim interfered in scuffle between employee and former patron of pavilion, exclusion of expert testimony offered to show the intoxicated condition of victim was not prejudicial to defendant under circumstances.

7. Evidence 🔑358
In action for death of person killed by employee of detective service who had been hired to protect skating pavilion and to maintain order, when victim interfered in scuffle between employee and a former patron of pavilion, a map of premises where shooting occurred, which had been used on trial of another action and bore numerous marks and figures placed thereon at such trial which were not relevant to facts in instant case, was not admissible.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Velma M. Martin against Joseph M. Leatham, doing business under the fictitious name of Patiner Pavilion, and others. From an adverse judgment, the defendants appeal.

Affirmed.

Hickcox & O'Connor, of Los Angeles, for appellants.

Dempster & Dempster, of Los Angeles, for respondent.

YORK, Justice.

The facts out of which this controversy arose are as follows: Defendant Leatham, as operator of Patiner Pavilion, a skating rink located in the city of Los Angeles, made an agreement with defendant Walworth, the owner and proprietor of Walworth's Detective Service, by which the latter was to furnish operatives to act as special officers at the skating rink and there to take tickets and to keep order. At 9:30 in the evening of October 26, 1935, defendant Gold was acting as special officer in pursuance with above-mentioned agreement and was then on duty at the skating rink.

It appears that one Sam Nen had purchased a ticket of admission to the rink early in the evening of October 26th, at which time he had been told that he was not to go in and out of the rink without purchasing another ticket. Notwithstanding this warning, he left the rink and returned later in the evening when defendant Gold was on duty, and attempting to enter the rink by proceeding through a small hallway directly to the door which gave admittance to the rink, he was prevented from doing so by defendant Gold. The two men engaged in a scuffle in the hallway, Gold pushing Nen out upon the sidewalk. During this time Lester Willard Wynkoop was standing talking to two friends in front of a cafe 20 or 30 feet west of the entrance to the rink. He made the remark that he guessed he had better go over and try to stop the fight; whereupon he did walk over to the fighting men, stepped between them, and pushed Gold back into the hallway. Gold then drew his gun and retreated into hallway with Wynkoop in pursuit. Immediately thereafter four shots were heard, and Nen entered the hallway and pulled Gold out upon the sidewalk, at which time Gold was holding his gun in his hand. Wynkoop, who was unarmed, was found lying in the hallway suffering from a bullet wound, from the effects of which he later died.

This action in damages was brought by the mother of said Wynkoop, who recovered a judgment for $3,000 against all three defendants. It is from such judgment that this appeal is prosecuted.

Appellants' first point is that the complaint does not state facts sufficient to constitute a cause of action against defendants Leatham and Walworth. In support of this contention, they cite the case of Ross v. Goins, 51 Cal.App. 412, 197 P. 132, which holds that a general allegation of agency is wholly insufficient to charge a principal with liability for the agent's wanton and malicious acts, but that it must be averred that the principal authorized or ratified them. The holding in the cited case is predicated upon section 2339 of the Civil Code, to wit: "A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service."

[1] However, we are inclined to the belief that section 2338 of the Civil Code is applicable to the facts presented by the case now before us. Said section reads as follows: "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, *including wrongful acts committed by such agent* in and as a part of the transaction of such business." (Italics ours.) This section has been construed to extend the responsibility of the principal to all wrongful acts committed by the agent within the scope of his employment. Johnson v. Monson, 183 Cal. 149, 190 P. 635. In the cited case it is stated at page 151 of 183 Cal., 190 P. 635, 636, quoting from Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 39, 124 P. 704, 41 L.R.A.(N.S.) 529: "'It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as a part of the transaction of such business. Story on Agency, § 452; Shearman & Redfield on Negligence, § 65; Civ.Code, § 2338.'" The court then says: "The situation is not changed by the fact that the court finds the assault to have been malicious and willful. Under some circumstances the malicious or willful character of the agent's act is material in determining whether or not the act was committed in the course of his employment. * * * If it appear that the tort was in fact committed by the agent in the course of his employment, the employer is not relieved of his necessary responsibility by its malicious or willful character. In the present case it appears plainly that the assault was committed by the bartender as a means to compel the plaintiff to cease the noise he was making in the saloon, that is, as a means of performing the bartender's duty of keeping order." Again, in Ruppe v. City of Los Angeles, 186 Cal. 400, at 402, 199 P. 496, 497, it is said: "But even if the act be malicious or willful and yet be one done in furtherance of the purpose of the servant's employment, the master is liable." It was further held in the Ruppe Case, supra, that "The rule is elementary that a master is responsible for the acts of his servant done in the course of his employment, even though those acts be unauthorized or contrary to the master's explicit instructions. As between the master and third persons, the acts of the servant, done as a part of the doing of that which he is employed to do, are as if done by the master himself, *and the question of authority* as between the master and servant to do the particular acts is quite immaterial." (Italics ours.) See, also, Hiroshima v. Pacific Gas & Electric Co. (Cal.App.) 63 P.(2d) 340.

[2] In the case before us, the complaint alleged that "at all times herein mentioned, the defendant, Joseph M. Leatham, was and still is doing business under the fictitious style and name of Patiner Pavilion Skating Rink. * * * the defendant Floyd W. Walworth was and still is doing business under the fictitious style and name of Walworth's Detective Service. * * * the defendant Harry J. Gold was and still is an employee or agent of the defendant Floyd W. Walworth, and acted as an operative for any customers of the Walworth Detective Service. That prior to the 26th day of October, 1935, the defendant, Joseph M. Leatham, employed the defendant, Floyd W. Walworth, to protect the Patiner Pavilion by use of the operatives

of the said Floyd W. Walworth, and that said employment continued through the 26th day of October, 1935, and thereafter." These allegations were admitted by the answer.

It was further alleged in the complaint that "on or about the 26th day of October, 1935, at Patiner Pavilion located at Slauson and Main Streets, in the City of Los Angeles, * * * defendant Harry J. Gold, ***in the course and scope of his said employment, negligently, carelessly and wantonly and without good or any cause shot the said Lester Willard Wynkoop,*** inflicting such serious wounds upon the body of the said Lester Willard Wynkoop, that the said wounds caused the death of the said Lester Willard Wynkoop almost immediately." These allegations were denied, but the trial court found upon conflicting evidence that "all of the allegations of the complaint are true, except the allegation as to the amount of damages. That all of the denials and allegations in the answer of the defendants are untrue." (Italics ours.) We are of the opinion that the allegations of the complaint are sufficient to state a cause of action against both defendants Leatham and Walworth, and that the use of the word "wantonly" instead of the words "willfully and maliciously" is immaterial, in view of all the facts and circumstances shown to have existed at the time of the altercation.

[3, 4] Appellants next contend that the evidence is insufficient to support the finding of the court that Harry J. Gold, at the time of the killing, was the agent of defendant Leatham. As we have already stated, the answer of defendants, by its failure to deny them, admitted the allegations in the complaint that defendant Gold was an employee of the defendant Walworth and acted as an operative for any customers of the Walworth Detective Service, and that defendant Leatham employed defendant Walworth to protect the Patiner Pavilion by use of operatives of the detective agency. Defendant Walworth testified that under his agreement with defendant Leatham he sent defendant Gold to the skating rink to maintain law and order. Defendant Leatham testified that "he told the Walworth Detective Agency that he wanted a man to come to the skating rink and stay in the vestibule and take tickets at the door and to keep order; that * * * he knew Mr. Walworth and knew that he ran a strictly first class place and depended upon Mr. Walworth to send the proper kind of man; that the same man was not on duty all the time; that there was a number of different men; that (he) Leatham had nothing to say about who should be sent." Defendant Gold testified that "he was employed by the Walworth Detective Agency * * * that his job at the skating rink was to maintain law and order and to take tickets; that he was not to admit anyone without a ticket; * * * that Mr. Leatham never gave him orders of that kind; that Mrs. Leatham was the only one that gave him those orders." This evidence was sufficient to support the finding objected to.

[5] Appellants next complain that the evidence is insufficient to support the finding that Harry J. Gold wantonly killed Lester Willard Wynkoop, as contained in the first finding of fact made by the court. Defendant Gold admitted the shooting, but maintained that he acted in self-defense. There were no eyewitnesses to the tragedy, and, necessarily, the evidence upon this issue was extremely conflicting. However, from a careful examination of the evidence set out in the bill of exceptions, we are convinced that there was sufficient evidence to support the finding objected to. Suffice to say that the trial court having resolved this conflicting evidence in favor of the plaintiff, this court has no power to interfere.

[6, 7] In view of the facts hereinbefore set forth, together with the announced attitude of the trial judge which was dependent upon his personal knowledge and observations in other spheres of activity to which he specifically referred in making his ruling with reference thereto, it becomes obvious that whatever merit (if any) may obtain with reference to appellants' additional point that the court erred in preventing defendants from showing by expert testimony the intoxicated condition of decedent, the result of the ruling was not prejudicial to the defense. Likewise it is concluded that the trial court committed no error in sustaining the objection of the plaintiff to the admission in evidence of the map of the premises where the shooting occurred, for the reason that the offered map was one which theretofore had been used on the trial

of another action and bore numerous marks and figures that were placed thereon at said trial and which were not relevant to the facts in the instant case.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

22 Cal.App.2d 460

SKULTE v. AHERN.

Civ. 10244.

District Court of Appeal, First District, Division 1, California.

Aug. 30, 1937.

Rehearing Denied Sept. 29, 1937.

Hearing Denied by Supreme Court Oct. 29, 1937.

1. Appeal and error 🔑1001(1)

The jury's determination is final, where there is any evidence which sustains the finding.

2. Trial 🔑241

In action by pedestrian for injuries sustained when struck by automobile at crosswalk at intersection, court did not err in reading in instructions to jury sections of vehicle act requiring motorist to drive on right side of street and to drive as closely as possible to right-hand curb, as against contention that statute was enacted for benefit of motorists traveling in same direction, since pedestrian and automobile were on same half of street, which is same situation arising when two vehicles are traveling in same direction (St.1931, p. 2124, § 122(a, b).

3. Evidence 🔑589

In action by pedestrian for injuries sustained when struck by automobile at crosswalk at intersection, jury was not compelled to accept motorist's lowest estimate of speed but was warranted in inferring from physical facts that his speed was excessive, where there was evidence that automobile carried pedestrian 40 feet, thereafter ran additional 40 feet before stopping, and that its tires made skid marks 40 feet in length.

4. Trial 🔑241

In action by pedestrian for injuries sustained when struck by automobile at crosswalk at intersection, court did not err in reading statutes specifying speed of 15 miles per hour across intersection with obstructed view, where from physical facts jury was warranted in inferring that motorist's speed was excessive (St.1931, p. 2120, § 113(b)(2).

5. Automobiles 🔑244(35)

In action by pedestrian for injuries sustained when struck by automobile at crosswalk at intersection, evidence established that motorist was negligent in not keeping automobile under proper control which would have avoided accident.

6. Evidence 🔑588, 589

In action by pedestrian for injuries sustained when struck by automobile at crosswalk at intersection, credibility of pedestrian and pedestrian's witness who testified that there were no lights on automobile was for jury, though pedestrian admitted that he first saw automobile when it was only a few feet away and witness admitted that he had not seen pedestrian or automobile before collision and did not know whether the street light in vicinity was illuminated, since it is common knowledge that human eye can photograph object with lightning-like rapidity without seeing all objects within vision, so that pedestrian may have seen that headlights were not burning and witness may have failed to see all within his line of vision.

7. Evidence 🔑589

In action by pedestrian for injuries sustained when struck by automobile at crosswalk at intersection, physical facts that pedestrian's body was found 40 feet past crosswalk with broken glass from headlights in vicinity were not so inconsistent with pedestrian's testimony that he was on cross-walk when struck, as to stigmatize it as inherently improbable (St.1931, p. 2127, § 131½(a, c).

8. Trial 🔑296(3)

In action by pedestrian for injuries sustained when struck by automobile at crosswalk at intersection, instruction that public highway, subject to provisions of any statute or ordinance, is open in all its length and breadth to reasonable, common, and equal use of pedestrians or motorists was not error, where court thereafter read relevant portions of vehicle act and ordinance (St.1931, p. 2127, § 131½ (a, c, e).

9. Negligence 🔑138(2)

Instruction that "burden of proof" of negligence rested on plaintiff and that if plaintiff made prima facie showing of negligence by defendant, "burden" was thrown on defendant to disprove it, was not erroneous as stating that "burden of proof" shifted, since instruction distinguished between two different burdens.

10. Trial 🔑296(1)

The omission of qualifications to instructions was not error where qualifications were stated in subsequent instructions.

11. Trial 🔑296(4)

In action by pedestrian for injuries sustained when struck by automobile, instruction that contributory negligence was in nature of plea of confession and avoidance, if erroneous, was not prejudicial, in view of evidence and other instructions.

12. Appeal and error 🔑216(1)

Defendant in personal injury action, who failed to request instruction separating general damages from special damages, could not complain of instruction failing to do so.

13. Damages 🔑187

Though plaintiff's testimony in personal injury action as to actual earnings before accident may have been utterly destroyed by impeachment, award could still have been made for loss of earning capacity, since loss of earning capacity is not necessarily dependent on actual receipt of wages.

14. Damages 🔑130(1)

$22,500 to pedestrian, who was struck by automobile, for extremely painful injuries consisting of gaping wound in head, fracture of arm, six ribs, leg, and vertebra, tearing of ligaments in leg and knee, and concussion of brain was not excessive, where award included medical and hospital expenses of $2,161.27 and something for loss of earning power in trade of marine machinist.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by August Skulte against James B. Ahern. From a judgment in favor of the plaintiff, defendant appeals.

Affirmed.

Redman, Alexander & Bacon, of San Francisco (Herbert Chamberlin, of San Francisco, of counsel), for appellant.

Keyes & Erskine and Eugene J. Mooslin, all of San Francisco, for respondent.

GRAY, Justice pro tem.

The complaint alleged that while respondent was walking at night southerly on the westerly side of Polk street across North Point street in San Francisco, appellant so negligently operated his automobile westerly on North Point street as to cause it to strike respondent, thereby inflicting upon him severe personal injuries for which he prayed general and special damages. The answer denied these allegations and affirmatively pleaded a defense of contributory negligence. After a trial, in which seven days were consumed in the presentation of evidence, the jury returned a verdict in favor of respondent for $22,500 and judgment was entered accordingly. His motion for a new trial having been denied, appellant appeals from the judgment, and in support thereof claims that the evidence does not establish his negligence but does establish respondent's contributory negligence as a matter of law: that the jury was misdirected to his prejudice; and that the verdict is excessive.

[1] Appellant argues the evidence fails to establish his negligence because it shows that he drove his automobile on the right side of the street, at a moderate speed, under proper control, and with lighted headlights, and that he had the right of way over respondent. Respondent replies that appellant supports his argument by quoting only such portions of the conflicting evidence as are favorable, and by ignoring other portions which fully sustain the jury's implied finding of negligence. If there is any evidence which sustains such finding, the jury's determination is final. Kleem v. Chapot, 112 Cal.App. 553, 297 P. 574.

[2] Polk street, running from north to south, has a width between property lines of 68 feet 9 inches, with sidewalks on each side 12 feet wide, and with its center occupied by a double set of street car tracks, terminating southerly of North Point street. The latter, crossing the former, has the same width, with sidewalks on each side 10 feet wide and with its center to a width of 16 feet 2 inches occupied by a double set of street car tracks, which cross Polk street. The northerly set of these tracks is located 26 feet south of the north property line of North Point street. Appellant fixed the position of his automobile at the time of the collision as straddling the most northerly rail, with its left wheel 2 or 3 inches to its north.

Respondent said that at that time such rail was between his feet, with his left foot nearly touching it and his right away over it. That respondent was struck by the left front headlight may be inferred from the fact that its lens was broken in the collision. Appellant admitted that he was not then preparing to overtake or pass another vehicle going in the same direction or to make a left-hand turn, and that the space between the rail and the curb was passable. It is clear, therefore, that he could have avoided the accident by veering his automobile but slightly to his right. Appellant argues that he was not negligent since he drove on his right half of the street, as required by subdivision (a) of section 122 of the California Vehicle Act (St.1923, p. 557, as amended by St.1931, p. 2124). Respondent contends that he was negligent since he did not drive as closely as practicable to the right-hand curb, as further required by subdivision (b) of the same section. The court in its instructions to the jury read both subdivisions. Appellant claims that it erred in reading the second subdivision, and in support thereof cites the cases of Arundel v. Turk, 6 Cal.App.(2d) 162, 44 P.(2d) 383, and Polk v. Weinstein, 12 Cal.App.(2d) 360, 55 P.(2d) 588. These cases hold that since subdivision (b) was enacted for the benefit of motorists traveling in the same direction, it did not apply to vehicles moving in opposite directions. Here the pedestrian and the vehicle were in the same half of the street, which is the same situation which arises when two vehicles are traveling in the same direction. If, as appellant concedes, respondent was entitled to the benefits of subdivision (a), the same reasoning should give him the further protection of subdivision (b). Since the second, as well as the first, subdivision governed appellant's operation of his automobile, the court correctly read such subdivision to the jury and the latter was justified in finding him negligent for his violation of it.

[3, 4] In one part of his cross-examination appellant estimated his speed across the intersection at 15 or less miles per hour, and at the moment of impact at 20 or less miles per hour, and upon these estimates argues that his speed was moderate. However, these estimates were impeached by higher rates of speed which he gave in other parts of his testimony, and which he had given in his deposition. Other witnesses testified that the automobile carried respondent 40 feet before he fell off; that it thereafter ran an additional 40 feet before stopping; and that its tires made skid marks 40 feet in length. The jury was not compelled to accept his lowest estimate, but was warranted in inferring from the physical facts that his speed was excessive. Linde v. Emmick, 16 Cal.App. (2d) 676, 61 P.(2d) 338. The intersection was illuminated by street lights, and its corners were occupied by buildings which obstructed his view of traffic moving on Polk street. The court read to the jury subdivisions (a). (b) (2), and (d) of section 113 of the California Vehicle Act (St.1923, p. 553, as amended by St.1931, p. 2120). Appellant asserts that subdivision (b) (2), specifying a speed of 15 miles per hour across an intersection with an obstructed view, should not have been read, because under his estimate of speed no issue as to its violation arose. This criticism ignores the conflicting evidence of speed pointed out above.

[5] Nor does his further claim that he had his automobile under proper control seem well taken. He testified that his brakes were in good condition and could stop the automobile within 12 feet when going 20 miles per hour. He also stated that his headlights were lighted, and that their rays extended 100 feet in front of the automobile. He admitted that he first saw the respondent when he was but 3 or 4 feet away. Since his view of objects in front was unobstructed, it was appellant's duty to have earlier seen the respondent. He was required to anticipate the presence of pedestrians in the crosswalk, and to keep such lookout and control of his machine as would enable him to avoid a collision. The evidence justifies the jury's conclusion that he did not discharge these duties and therefore was negligent in not keeping his automobile under such proper control as would have avoided the accident. Potter v. Driver, 97 Cal.App. 311, 275 P. 526.

[6] At the trial appellant stated that his head and taillights were connected on the same circuit, which caused both to be on or off at the same time; that his lights were lit at the time of the accident; and that he turned them off after he had parked at the curb before the arrival of a police officer. Previously the officer had testified that the lights were out when he arrived. Appellant's testi-

mony that he turned off the lights before the officer's arrival is impeached by the statement in his deposition, before he corrected it, that the lights were then burning. He was corroborated by the statements of the motorman and conductor of a street car then standing on Polk street that they saw the taillight of the automobile burning as it traveled westerly of the intersection. He was contradicted by the respondent, who said the lights were not lit when he was struck. The latter admitted he saw the automobile travel only a few feet before he was hit. A painter swore that the automobile did not have lights, without specifying whether he was referring to the tail or headlights or both. The latter admitted that he had not seen either the pedestrian or the automobile before the collision, and that he did not know whether or not a street light in the vicinity was illuminated. Appellant argues that their admissions make their testimony incredible. Unless their testimony was inherently improbable, its credibility was a matter for the jury's determination, and unless it was contrary to the laws of nature it cannot be held inherently improbable. Hughes v. Quackenbush, 1 Cal.App.(2d) 349, 37 P.(2d) 99. Since it is common knowledge that the human eye can photograph an object with lightning-like rapidity, it cannot be said, as a matter of law, that the length of respondent's observation was too brief for him to have seen the headlights. Nor did the painter's failure to see all objects within his vision render his observation of a portion incredible, for such is a common experience. 70 Cor. Jur. 87.

[7] Subdivision (a) of section 131½ of the California Vehicle Act (as added by St.1931, p. 2127) required the driver of a vehicle to yield the right of way to a pedestrian crossing the roadway within a crosswalk, and subdivision (c) of the same section required a pedestrian crossing a roadway at any point other than within a crosswalk to yield the right of way to vehicles. A city ordinance provided that "when within * * * a business district, no pedestrian shall cross a roadway other than by a crosswalk." It was stipulated that the scene of the accident lay within a business district. Respondent's position with reference to the crosswalk at the moment of collision determines who had the right of way under section 131½, and whether he was contributorily negligent because of his violation of the ordinance. Respondent stated positively that he was then walking in the crosswalk. Appellant testified that he was 8 or 10 feet past the intersection when he first saw respondent; that he found respondent's body 15 feet west of the crosswalk; and that he must have struck him before that. Other witnesses testified that the body was lying about 40 feet west of the crosswalk with blood and broken glass from the headlights in the vicinity. Appellant argues that these physical facts corroborate his version and destroy respondent's testimony as incredible. But these physical facts are not so inconsistent with respondent's testimony as to stigmatize it as inherently improbable. Hosking v. Danforth, 1 Cal.App.(2d) 178, 36 P.(2d) 427. Indeed, other testimony above pointed out that respondent was carried 40 feet before he fell to the pavement readily accounts for the body, glass and blood 40 feet west of the crosswalk. The jury was authorized, under the conflicting testimony, to find that respondent had the right of way and did not violate the city ordinance.

[8] The court instructed the jury that "a public highway, *subject to the provisions of any statute or ordinance,* is open in all its length and breadth to the reasonable common and equal use of the people on foot or in vehicles" and that "a traveler on foot has the same use to the public highway as an automobile or other vehicle." (Italics ours.) After amplifying these principles, it read subdivisions (a), (c), and (e) of section 131½ of the California Vehicle Act (as added by St.1931, p. 2127) and the above-mentioned city ordinance. Appellant correctly contends that the equal and common right of pedestrians and motorists to use any part of the highway, as stated in the quoted instruction, is curtailed by the restrictions stated in said section 131½ and in the city ordinance. He argues that the two portions of the instructions are contradictory, and since it is impossible to ascertain which the jury followed, that these quoted instructions are prejudicially erroneous. But the instructions must be read together. It is clear that the court, by the italicized portion of the quoted instruction, told the jury that the common-law right of a pedestrian and a motorist therein stated was subject to the regulations of the ordinance and statute subsequently read.

[9] It is contended that the jury was prejudicially misdirected by the following instruction: "You are instructed that in this case the *burden of proof* of negligence rests upon the plaintiff; that if the plaintiff makes a prima facie showing of negligence by defendant the *burden* is then thrown upon the defendant to disprove it." (Italics ours.) Of course, as appellant states, the burden of proof never shifts from the party maintaining the affirmative of an issue, but, as respondent says, the burden of producing evidence to meet his prima facie case does pass to his opponent. The instruction clearly distinguishes between these two different burdens for one alone is qualified by the addition of the phrase "of proof." The two clauses are not contradictory. The second clearly means that the burden of producing evidence to meet respondent's prima facie case rested upon appellant. The latter meets and therefore disproves the former's prima facie case when he balances it evenly without proving absence of negligence by a preponderance of the evidence. Smith v. Hollander, 85 Cal.App. 535, 259 P. 958; Koyer v. Willmon, 12 Cal.App. 87, 106 P. 599. Any uncertainty as to its meaning was removed by other instructions, which, as appellant concedes, correctly and completely stated the rules as to the burden of proof and the preponderance of evidence.

[10, 11] Appellant criticizes an instruction to the effect that a pedestrian has a right to assume that a motorist knows the law and will obey it, upon the ground that it omits the qualification that a pedestrian who is negligent cannot rely or act upon such assumption. He also complains of an instruction on the doctrine of sudden peril, for its omission of the qualification that a person who is negligent cannot claim its protection. The criticisms are without merit, since in both instances the qualifications were stated in subsequent instructions. In one of fourteen exhaustive and voluminous instructions on contributory negligence the court said: "Contributory negligence is in its nature a plea of confession and avoidance. Contributory negligence in law is predicated upon the existence of negligence on the part of the defendant, the responsibility for which he avoids by showing concurrent and contributing negligence on the part of the person injured." Conceding that this instruction was erroneous, it does not appear, in view of the evidence and the other correct instructions, that it caused a miscarriage of justice. Harveld v. Milani, 1 Cal.App. (2d) 157, 36 P.(2d) 393.

[12-14] The complaint alleged that respondent had been damaged in the sum of $20,000 by reason of his physical injuries; in the sum of $10,000 by reason of his inability to follow his trade of marine machinist; and in an unascertained amount for medical and hospital treatment. It prayed for $30,000 as general damages, and for the reasonable value of the medical and hospital treatment as special damages. An instruction stated that respondent sought to recover $30,000 as general damages for injuries and suffering and loss of earning power. Appellant argues that the lumping together of the amount claimed for injury with that claimed for loss of earning capacity removed any limitation on the amount which the injury could award for the latter. A similar argument was held untenable in Johnson v. Pearson, 100 Cal.App. 503, 280 P. 394, where it was said that a similar instruction was correct, and that if an appellant desired segregation he should have requested it. Even if, as appellant argues, respondent's testimony as to actual earnings before the accident was utterly destroyed by impeachment, yet it does not follow that no award should have been made for loss of earning capacity since the latter is not necessarily dependent upon the actual receipt of wages. Marshall v. Smith, 131 Cal.App. 258, 21 P.(2d) 117; Girard v. Irvine, 97 Cal.App. 377, 275 P. 840. A calm recital of respondent's injuries refutes appellant's argument that the verdict of $22,500 was excessive. Included therein was the sum of $2,161.27 to cover expenditures for medical and hospital treatment, and something for loss of earning capacity, since the permanent effect of his injuries incapacitated him from following his trade. He sustained a gaping wound on the right side of his head, fractures in his upper right arm at the elbow, in six ribs on his right side, in the fibula and tibia of the left leg and in the first lumbar vertebra, a tearing of the internal lateral ligaments of the left leg and right knee, and a concussion of the brain. He was in the hospital over two months, during which he endured severe suffering, particularly from paralyzed bowels and traction applied to his leg and arm. His injuries were permanent to the extent that three ribs did not unite; that the right elbow is limited 20 degrees in the

extension and 10 degrees in flexion; that his left knee is unstable and disabled 25 to 50 per cent.; that he does not have full use of his right hand; and that he still suffers headaches and dizziness.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

22 Cal.App.2d 480

In re BROWN'S ESTATE.

KELLEY et al. v. BROWN et al.

Civ. 1698.

District Court of Appeal, Fourth District, California.

Aug. 31, 1937.

1. Trusts 🔑179, 231(1)

A trustee must act in the highest good faith toward his beneficiary and must not occupy a position where his interests conflict with those of the beneficiary or where he is exposed to the temptation of acting to contrary to best interests of beneficiary.

2. Trusts 🔑159

In determining whether a nominated trustee is disqualified, trial court has a large discretion.

3. Trusts 🔑159

The appointment of two employees of operating company who were indebted to holding company for price of stock in operating company which they had pledged to secure indebtedness to operating company for withdrawals, to act as trustees with three others of trust estate consisting of part of capital stock of holding company, was not an abuse of discretion because of employees' alleged adverse interest where trustor had known of indebtedness and of practice of making withdrawals and it was to employees' interest to operate business successfully.

4. Trusts 🔑160(3)

In proceedings on objections to appointment of testamentary trustee because of his alleged excessive use of alcoholic liquors, exclusion of evidence of reputation for intoxication was not abuse of discretion where trial court indicated he was satisfied with direct evidence and proferred testimony could do no more than add to conflict.

5. Wills 🔑766

Whether certain advancements made by testator were ademptions was a question of interpretation and the intention to be sought for would be that expressed in language of will.

6. Wills 🔑766

Advancements are not to be taken as ademptions of general legacies unless such intention is expressed by testator in writing.

7. Wills 🔑766

Under will which created a spendthrift trust for certain named beneficiaries and in residuary clause provided that any advancements made to beneficiaries were to be deducted from share of such beneficiaries in certain proportions, advancements to beneficiaries which were in excess of their shares in the residue were not chargeable against their respective interests in trust estate (Probate Code, § 104).

8. Wills 🔑762

Beneficiaries, to whom advancements had been made, were not estopped to claim that excess advancements were not payable out of their respective shares in trust estate by allegation in their first objections to appointment of certain trustees that trust had been created subject to adjustments for advances, where allegation was made incidentally in setting up general facts as they might relate to appointment of trustee.

9. Wills 🔑762

Beneficiaries to whom advancements had been made were not estopped from denying that excess advancements were not chargeable against their respective interests in trust estate created by will by allegation in objections to appointment of certain trustees that trust was subject to adjustments for advances, since the proper interpretation of a will cannot be settled or controlled by admission or stipulation of parties.

◆

Appeal from Superior Court, Orange County; J. O. Moncur, Judge.

Proceeding in the matter of the estate of W. T. Brown, deceased, with respect to the final accounting and petition for distribution of Arthur J. Kelley and others, opposed by Helen Brown and others. From an order approving the final account and decreeing distribution of the estate, the objectants appeal.

Order and decree appealed from reversed in part with directions and affirmed in part.

Forgy, Reinhaus & Forgy, of Santa Ana, and Nichols, Cooper & Hickson and Allan J. Carter, all of Pomona, for appellants.

Head, Wellington & Jacobs, of Santa Ana, and Guss Hagenstein, of Fullerton, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order approving a final account and decreeing distribution of an estate.

W. T. Brown died on November 22, 1933. A large part of his estate consisted of 249,999 shares of stock in W. T. Brown Estate, Inc. That was a holding company with 500,000 shares of stock of the par value of $1 each, of which his widow, Alice Brown, owned 250,000 shares and Arthur J. Kelley held 1 share. Brown, his wife, and Kelley had been the directors of this corporation. After Brown's death, his widow transferred 1 share to their daughter Katherine McGill, and since then the widow, Kelley, and Mrs. McGill have acted as directors. The principal asset of W. T. Brown Estate, Inc., was 14,860 shares of stock in Brown & Dauser Co., a corporation which owned and operated several lumber yards and some orchards.

Arthur J. Kelley and Lester W. Breiner had for many years worked for W. T. Brown in connection with the business of Brown & Dauser Co. and after Mr. Brown's death continued in the active management of that business. In 1925 Mr. Brown had sold 2,476 shares of stock in Brown & Dauser Co. to Kelley and a like number of shares to Breiner. In payment therefor, he had taken from each a note for about $50,000 payable on or before 10 years after date, with interest at 4 per cent. to be added to the principal if not paid annually. Each note recited that 2,476 shares of the capital stock of Brown & Dauser Co. had been deposited as collateral security, that it was agreed that all dividends paid on this stock were to be applied on the note until it was paid in full, that it was understood that Mr. Brown was selling this stock in recognition of past services, and that the signer of the note agreed to remain in the service of Brown & Dauser Co. until the note was paid. There were 20,000 shares of stock in Brown & Dauser Co., the other 188 shares being owned by other members of Brown's family. It will be observed that the W. T. Brown Estate, Inc., owned a controlling interest in Brown & Dauser Co. and at the time of the trial Alice Brown, the widow, Arthur J. Kelley, and Mrs. McGill, a daughter of deceased, held a controlling interest in W. T. Brown Estate, Inc., and constituted the board of directors of both corporations.

Arthur J. Kelley, Lester W. Breiner, and the widow were appointed executors of Brown's estate in accordance with a nomination in the will. Paragraph "Fourth" of the will gave in trust to Arthur J. Kelley and Lester W. Breiner 249,999 shares of the capital stock of the W. T. Brown Estate, Inc. The trust provisions gave the trustees broad powers as to the management and control of the trust estate, with power to sell and reinvest, and named as beneficiaries four children, a daughter-in-law, and three grandchildren of the testator who were given, subject to the trust, varying numbers of shares of this stock. The trust was to remain in force for 10 years, during which time the net income was to be paid to the beneficiaries in proportion to the stock each was ultimately to receive. If any beneficiary died without issue before termination of the trust, his share was to be divided among the survivors. This fourth paragraph closed with a spendthrift clause restraining each beneficiary from transferring, pledging, anticipating, or in any other manner impairing his interest in the trust estate. In a codicil dated November 2, 1931, Arthur J. Kelley, Lester W. Breiner, Alice Brown, Katherine McGill, and Helen Brown, another daughter, were named as trustees of this trust. The "Fifth" paragraph of the will disposed of the residue of the estate and the last clause thereof related to advancements that might thereafter be made by the testator.

In due course the executors filed a final account and petition for distribution, asking that the 249,999 shares of stock in W. T. Brown Estate, Inc., be distributed to the five named trustees. Helen Brown, a daughter, Mabel Butler, a daughter, W. Grant Brown, a son, and Pansy Brown, his wife, who were four of the eight beneficiaries of the trust, filed an objection to the appointment of Kelley and Breiner as such trustees on the ground that their personal interests conflicted with the interests of the beneficiaries. On June 24, 1935, a hearing was had and the court overruled the objection and ordered the appointment of the five named trustees. Findings of fact were filed, but before an order and decree was entered, the executors filed a request for instructions on certain matters pertaining to the closing of the estate setting forth, among other things, that a question had arisen as to whether some advancements, which exceeded the part of the residue distributable to certain heirs, should be charged against the interest of such heirs in the trust estate set up in the earlier paragraph of the will. In this connection it appears that after the will was executed the testator had advanced to three of the four objectors a total of about $29,000 and had advanced to the other four beneficiaries a total of about $5,000. The court ordered a supplemental account and petition for distribution to be filed and this was done. The four objectors filed supplemental objections to the appointment of Kelley and Breiner as trustees. After a hearing in May, 1936, the court filed additional findings, approved the account, and entered a final decree of distribution. Among other things, the final decree appointed Kelley and Breiner as two of the five trustees, and ordered any advancement in excess of the share of the residue available for distribution to any particular heir to be charged against the interest of that beneficiary in the trust estate. It was provided, however, that each beneficiary should have the income from his interest in the trust property until the end of the 10-year period and that any excess in advancements should then be deducted from that part of the corpus of the trust estate which would otherwise come to any such heir and should constitute a first and prior lien on any such interest in the stock. The four objectors have appealed from this order and decree.

The first contention is that the court erred in appointing Kelley and Breiner as two of the five trustees. It is argued that both are disqualified, as a matter of law, since their personal interests conflict with those of the beneficiaries "by reason of each being large debtors to W. T. Brown Estate, Inc., and to Brown & Dauser Co., and at the same time officers and employees of said companies." We are pointed to no evidence in support of a further statement that each had exhibited a feeling of marked hostility toward certain of the appellants.

In addition to their notes to W. T. Brown Estate, Inc., secured by a pledge of the stock in Brown & Dauser Co., Kelley was also indebted to the latter company on a note for $1,500 and on an open account for some $1,200, and Breiner was obligated to that company on a note for $1,175, another note for $2,825 and on an open account for some $800. It appears from the evidence that these open accounts largely represented advances or withdrawals taken by these men over a period of years, a charge slip being put in the cash drawer. It also appears that this was a practice followed by all office employees of Brown & Dauser Co. for many years, that it had gone on with the knowledge of Mr. Brown during his lifetime, that it was continued thereafter with the knowledge of the directors of that company, that some months before the hearing the directors had ordered the practice stopped, and that Kelley and Breiner had complied with this order. The two notes covering the purchase price of stock in Brown & Dauser Co. came due after the death of W. T. Brown and have not been paid or renewed. It is argued that if Kelley and Breiner are appointed as two of the trustees, any negotiation for the settlement of these various debts would simply be between themselves, personally and as fiduciaries.

[1, 2] The appellants rely particularly on the case of Overell v. Overell, 78 Cal. App. 251, 248 P. 310, and cases therein cited. It is well settled by that case, and many others, that a trustee must act in the highest good faith toward his beneficiary and must not occupy a position where his interests conflict with those of the beneficiary or where he is exposed to the temptation of acting contrary to the best interests of the beneficiary. In that case the removal of a single trustee was approved where he had used certain corporation stock, being the corpus of the trust estate, to control that corporation and where in important respects he had used the control thus secured for his own interest and against the interest of the beneficiary. Not only are the facts of that case considerably different from those with which we are now concerned, but a number of other considerations are here involved. An original appointment is

here attacked and not a removal, a number of things require consideration in determining whether conflicting interests appear, the appointment does not carry control of the trust estate, and the appointment was desired by the testator with a full knowledge of all of the essential facts. A court has a large discretion in such matters and the real question is not whether the court would have been justified in refusing to make these appointments, but is whether a disqualification so clearly appears that it must be said that the court abused its discretion.

In Cowen's Estate, 148 Misc. 35, 265 N.Y.S. 40, 43, the court says: "Petitioner contends that by reason of such facts and of the possibilities involved, the personal interest of the respondents is so inherently antagonistic to their duties as trustees as to render them removable under the doctrine of Pyle v. Pyle, 137 App. Div. 568, 122 N.Y.S. 256, and other cases cited by the petitioner under this head. The rule of these cases does not apply. The position in which these respondents are now found is the position in which they were placed by the testator himself."

In Bailey's Estate, 306 Pa. 334, 159 A. 549, 551, the court said: "It is a serious matter to dismiss trustees appointed by will; much more should be shown by those who wish them dismissed than would be the case where the trustees are appointed by the court."

In Restatement of the Law on Trusts, § 107, it is said: "The court will less readily remove a trustee named by the settlor than a trustee appointed by the court or by a third person who is by the terms of the trust authorized to appoint a trustee. The court will not ordinarily remove a trustee named by the settlor upon a ground existing at the time of his appointment and known to the settlor and in spite of which the settlor oppointed him, although the court would not have appointed him trustee."

In the next paragraph is the further statement: "In extreme cases a court may, on grounds of public policy, remove a trustee upon a ground existing at the time of his appointment and known to the settlor and in spite of which the settlor appointed him, or the court may upon like grounds refuse to confirm the appointment. Thus, if the trustee named by the settlor is under an incapacity, or if he had shown himself to be a dishonest man, or entirely lacking in the qualifications necessary for the administration of the trust, the court will remove him or refuse to confirm his appointment, even though the ground was known to the settlor when he named him as trustee."

In refusing to remove testamentary trustees, the Supreme Court of Illinois said: "The desires of a testator in the appointment of a trustee will be observed, although he may see fit to appoint a person whose relationship to the estate is such that a court of equity would not appoint him if the appointment was to be made by the court." In re Weller's Estate, 267 Ill. 230, 108 N.E. 306, 311.

In Suffolk v. Leiter, 261 Ill. App. 82, after saying "Whether a trustee should or should not be removed is a question addressed to the sound discretion of the court, and is dependent upon the circumstances of each particular case," the court pointed out that the person whose removal was sought was but one of three trustees and that he could do nothing to jeopardize the estate without the concurrence of another trustee, which gave the remaindermen the protection that the testator had in mind. In the case of In re Wakefield's Estate, 188 Wis. 322, 206 N.W. 76, 78, the court said: "If the argument made by counsel for the petitioner is carried to its logical conclusion, it would result in the appointment of separate trustees for the benefit of the petitioner who claims through Thomas Wakefield. Such trustees could not elect themselves members of the board of directors of the corporation, nor could they have a controlling voice in the management of the trust. In view of the situation that exists, there being no allegation of mismanagement, refusal to act, or other misconduct on the part of the trustees, it cannot be said that their position as officers and directors is hostile or inconsistent with their duties as trustees or that their actions are contumacious."

[3] In the instant case Kelley and Breiner had been long associated with the testator in the business which furnishes the main foundation for the assets of the estate and the corpus of the trust. His will clearly shows that he had implicit confidence in them and that he regarded it for the best interest of all concerned, including the beneficiaries of the trust, to have the business continued and their services retained. While they owed a large amount to W. T. Brown Estate, Inc.,

this was secured by a pledge of stock in the operating company. It was thoroughly understood by every one that they could not pay this large indebtness except out of dividends on that stock. It was to their interest, as well as to the interest of the beneficiaries, to make the operation of the business a success. Their other indebtedness was small and if it is to be assumed that it might be to their interest to fail to pay the same any such possibility is offset by the fact that their position as trustees would not enable them to carry out any such plan. The stock constituting the corpus of the trust estate was not a controlling interest in W. T. Brown Estate, Inc., and, of course, did not give control over the other corporation. If it were thus controlling, Kelley and Breiner would be a minority of the five trustees and could not control the stock in the trust estate. Even so far as their smaller debts are concerned, it was to their interest to make the operating corporation a success in order that they might be able to pay them. As employees they were paid respectively $175 and $150 per month. Their salaries had been reduced about 56 per cent. during the depression through two cuts, one of which occurred after the testator died. There is no evidence that the business was not being run in the best possible manner and no evidence of anything done by any one at any time to control either corporation in any manner adverse to the interest of these complaining beneficiaries. Practically all of the matters complained of were fully known to the testator at the time he made his will and when he executed the codicil thereto. While he had no knowledge of certain withdrawals or advances taken by Kelley and Breiner after his death, he did know of that custom which had obtained for many years before. The directors of the corporation knew of the subsequent withdrawals and when they ordered them to stop the order was complied with. While the notes given by Kelley and Breiner in payment for stock did not become due until after the death of the testator, he knew that they would become due at the time fixed therein and knew that they would be unable to pay the notes except out of dividends on the stock, which was exactly what was intended by all parties. The widow and four of the beneficiaries of the trust, being those who had much the largest interest therein, favored the appointment of Kelley and Breiner as trustees. While the interest of minority beneficiaries are entitled to protection, the interests of the others should also be considered, and in this case the trustees whose right of appointment is questioned will not be able to control the trust estate, which fact in itself is a considerable protection to the appellants. It does not clearly appear that the personal interests of these two trustees so conflict with the interests of these beneficiaries as to disqualify them as a matter of law, or that their appointment would enable them to favor their own interests over those of the beneficiaries. As the trial court remarked, they may be removed if they violate their trusts in any respect.

[4] It is also urged that Kelley is further disqualified by reason of his addition to the excessive use of alcoholic liquors. Some evidence on this point was received at the hearing in June, 1935. Other evidence was offered and rejected, the court saying he would consider it as true. At the next hearing, nearly a year later, there was testimony that Kelley was intoxicated on January 1, 1936, which was denied by him. Evidence of reputation for intoxication was again offered and refused admission. The main contention here is that this was admissible. If it had been received, it would merely have added to a conflict which already existed. The court rather forcibly indicated he was satisfied with the direct evidence. Under the circumstances here appearing, and where the proffered testimony could do no more than add to the conflict, the discretion exercised by the court should not be disturbed on appeal, and the question as to the admissibility of this evidence need not be decided.

It is next contended that the court erred in holding that certain advancements made by the testator after the execution of the will, which exceed the amount the respective individuals will receive under the residuary paragraph, are chargeable against the interest of these parties in the trust estate.

The material parts of paragraph "Fifth" of the will read as follows:

"Fifth: As to any other property which I may own at the time of my demise not hereinbefore specifically devised * * * I give, devise and bequeath all of said property as follows:

"(a) One-half share of all of said property to my wife, Alice Beazley Brown * * *;

"(b) The remaining one-half share of all of said property to be divided between the following named persons as follows: (The testator's four children, the daughter-in-law, and three grandchildren are then named, with the share each is to receive.)

"(c) As to any advancements made after the date of this Will to any of my said heirs hereinbefore named in this Will, I state that I will hereafter keep a set of books of my private personal accounts with my said heirs, and said private books will show all advancements made by me to my said heirs; that the total amount of all advancements made by me to my said heirs as shown by my said private books at the date of my demise, shall be deducted from the share of such heir or heirs, and said sum or sums so deducted for advancements shall be divided among my other heirs in the proportion set forth in the Fifth Paragraph of this Will. All advancements as shown by my said private books shall be deducted from the share of such heir or heirs, whether the same may be legally enforcible, outlawed or not."

[5, 6] The question is one of interpretation and the intention to be sought for is that which is expressed in the language of the will. Estate of Young, 123 Cal. 337, 55 P. 1011. In Estate of Vanderhurst, 171 Cal. 553, 154 P. 5, 7, it is said: "Advancements are not to be taken as ademptions of general legacies unless such intention is expressed by the testator in writing." Section 104 of the Probate Code provides "a clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct, or by inference or argument from other parts of the will."

[7] As stated in the first clause thereof, this paragraph relates to property not theretofore specifically devised. After saying that all of the residue is given "as follows:" the following matter is divided into three heads marked (a), (b), and (c). The matter of advancements covered in subdivision (c) is not only placed in a paragraph which specifically purports to deal with the residue, but appears to be limited to that part of the estate by the structure, punctuation, and language used. Subdivision (c) speaks of the share "of such heir or heirs," but contains no language indicating that it was thereby intended to refer to the share of such heirs in the entire estate, or to anything but the share being considered in that paragraph, namely the residue. The advancements are treated as a part of the residue and the fact that they are to be deducted and divided in the proportion set forth in that paragraph, which is entirely different from the proportion used in the trust provision, is a further indication of an intention to refer to the part of the estate then under consideration and not to another part which had been divided in another manner. The natural and reasonable interpretation of the language used is that this paragraph relates in its entirety to the residue of the estate.

This view is strengthened by the fact that the testator had theretofore, in paragraph fourth, specifically devised certain property to be held in trust for 10 years, with clear provisions designed to prevent those heirs and devisees from either disposing of that interest or anticipating the same in any way. This furnishes strong evidence of his intention to have that part of his estate kept intact in order that it might go to those parties at the end of ten years and not before.

A further consideration is that a share in the residue is the only part of this estate which one of these devisees would certainly get or which he could dispose of by his own will. The interest of each devisee in the trust estate is contingent upon his living until the end of the trust period. In the absence of language clearly expressing such an intention, it cannot be assumed that the testator intended to make this definite deduction or charge applicable to an indefinite or contingent interest which might never be received. In our opinion, the court erred in interpreting these provisions as requiring or authorizing the collection of any excess advancements by making the same a charge against the respective interests in the trust estate.

[8, 9] In this connection the respondents argue that the appellants are estopped from now claiming error in this respect since in their first objections, filed on May 3, 1935, they alleged that a trust had been created by the will for the benefit of certain persons in specified share amounts "subject to adjustments for advances made by the deceased in his lifetime." This allegation was made incidentally in setting up the general facts as they might relate to the appointment of trustees. The first hearing was devoted to that question and the interpretation of the will received slight, if any, consideration. When the executors

later filed a request for instructions, the question of advancements and the interpretation of this part of the will was raised and was for the first time considered at the second hearing. At that time counsel for these appellants argued to the court that most of the devisees who had received advancements would receive nothing from the estate except a beneficial interest in the trust and that this trust was not subject to any charge for the advancements. It was then suggested by both sides that this was a question of interpretation which must be decided by the court, and the matter was taken under advisement.

Not only are the facts insufficient to show an estoppel, as is here claimed, but the proper interpretation of a will cannot be settled or controlled by the admission or stipulation of the parties. In re Young's Estate, 92 Misc. 633, 157 N.Y.S. 494; In re Zweifel's Will, 194 Wis. 428, 216 N.W. 840; In re Schilling's Will, 205 Wis. 259, 237 N.W. 122, 75 A.L.R. 184; In re Stanley's Will (Wis.) 269 N.W. 550.

That portion of the order and decree appealed from which orders any excess advancement received by any devisee to be charged against the interest of such person in the trust estate is reversed, and the trial court is directed to amend that part of its findings and decree in accordance with the views herein expressed. All other portions of the order and decree are affirmed. Each side to pay its own costs.

I concur: JENNINGS, J.

---

22 Cal.App.2d 512

BENE v. LA GRANDE LAUNDRY CO.

Civ. 10123.

District Court of Appeal, First District,
Division 1, California.
Sept. 8, 1937.

1. Master and servant 🔑21

An agreement to employ a person for life, to be enforceable, should be specific and definite with little or no reason for misunderstanding.

2. Master and servant 🔑29

An employee's connection with his employment ceases when he leaves of his own accord, and he cannot insist on re-employment; the only way he can return to it being to make a new contract with his employer.

3. Master and servant 🔑29

Where, after employer had allegedly promised injured employee work for life if employee would not sue for injuries, employee quit of her own accord to be married, employee abandoned all right to future employment under the alleged oral agreement, and after a lapse of nearly 25 years could not require employer to re-employ her.

4. Master and servant 🔑29

Even if employee, who left employ of her own accord after employer had allegedly promised her work for life if she would not sue for injuries sustained while working, had not quit but had taken a leave of absence with her employer's consent, employee did not return to her employment within a "reasonable time," and hence had no rights under agreement, where she did not seek re-employment until approximately 25 years thereafter.

[Ed. Note.—For other definitions of "Reasonable Time," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Marie Bene against the La Grande Laundry Company. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

Joseph E. Isaacs, and Alan H. Critcher, both of San Francisco, for appellant.

John J. Barrett and Frank I. Barrett, both of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff appeals from a judgment entered in defendant's favor pursuant to an order granting a nonsuit in an action to recover damages for the alleged breach of an oral agreement which plaintiff claims was made on behalf of defendant to give her employment.

The essential facts shown by the evidence are as follows: On April 6, 1906, while working in respondent's laundry in San

Francisco, appellant's right hand and arm were caught in a mangle, and crushed so badly that amputation of the arm was necessary. Upon recovering from the effects of the operation, and on July 24, 1906, she returned to the laundry, and according to her testimony was told by the superintendent and the president of the respondent company that if she would not sue the company on account of the injuries she had received, she would "be given a job any time" and "for life if she wanted it." At all events, she was put to work in the distributing room, folding clothes, and was paid $7 a week for her services, which was a dollar a week more than she was receiving when injured. She continued in such employment until December, 1908, at which time she quit voluntarily to be married, stating that her intended husband was opposed to her working after their marriage. At the time she quit the superintendent told her, so she testified, that any time she wanted to come back they "would be glad to have her." Twenty-four years later, that is, in December, 1932, her husband died, and about two months subsequent to his death she returned to the laundry and applied to the superintendent for a job, stating that owing to her impoverished financial condition she was much in need of work. He replied, so she testified, that he would see what could be done for her. Not hearing from him, she applied again, several times, personally and by phone, to the superintendent and also to the then president of the company, but on each occasion was told, according to her testimony, that if employment could be found for her she would be notified. Finally, in 1933, she commenced this action for damages. Her requests for re-employment were always based upon the plea that due to her stringent financial circumstances she was much in need of a job. At no time did she mention the matter of the alleged oral promise upon which her action is founded.

Among the points urged by respondent in support of the trial court's ruling granting the nonsuit are: First, that appellant's testimony relating to the making of the promise to give her life employment is so inherently improbable that it is legally insufficient to establish the existence of such a promise; second, that even assuming that the promise was made as claimed by her, it was not binding on the respondent corporation for want of legal authority on the part of the superintendent and the president to make such a promise; third, that said promise, if made, was invalid for want of consideration, it being contended in this regard that no cause of action for damages against respondent ever arose out of the accident (which happened prior to the enactment of the Workmen's Compensation Act [St. 1917, p. 831, as amended]) because of the intervention of the doctrines of assumed risk, contributory negligence, and negligence on the part of a fellow employee; fourth, that assuming, as claimed by appellant, that an oral agreement was made to give her life employment, no action for damages for the breach thereof can be maintained because admittedly nothing was said as to the amount of wages she was to be paid, the kind of work she was to perform, nor the conditions under which she was to work, and that such being the case, said oral agreement was entirely lacking in the necessary elements upon which to found a rule for the ascertainment of the financial loss appellant claims to have sustained by reason of the alleged breach; and fifth, that any oral agreement so made on behalf of respondent was fully performed and discharged by it, in keeping appellant in its employ until she quit voluntarily; in other words, that appellant permanently abandoned all rights under such an agreement by quitting voluntarily to be married, and that subsequently, and especially after a lapse of nearly twenty-five years, there was no obligation on the part of respondent to reemploy her.

[1] It is evident that appellant's uncontradicted testimony is legally sufficient to support the conclusion that respondent's superintendent and president promised her that if she refrained from suing respondent she would be given employment for life, if she wanted it, and that her promise not to sue constituted a valuable consideration; but there would seem to be much force in respondent's contention that the promise made by the company's officers was not binding on the corporation because, as pointed out by respondent, no testimony was introduced to show that either of them was ever vested with the legal authority to make such an agreement, or that said agreement was ever brought to the attention of the board of directors. Rasnick v. W. M. Ritter Lumber Co., 187 Ky. 523, 219 S.W. 801; Pedicord v. Elm Grove Mining Co., 110 W.Va. 116, 157 S.E.

89; Heaman v. E. N. Rowell Co., 261 N. Y. 229, 185 N.E. 83, 84. In the case last cited the court in considering a similar question went on to say: "Alleged contracts of life employment are, however, so unusual as to have been, with rare exceptions, condemned by the courts as unreasonable and unauthorized. The president or other executive officer of a corporation has no authority as such to make a contract that one should remain in the corporate employ for life even under a general power 'to appoint, remove and fix the compensation of employees.' That any board of directors or other persons responsible for the management of a corporation should give such unusual power to an executive officer cannot be implied. Plain language of the managing board, clearly showing that such was the intention of the corporation, coupled with power actually or impliedly vested in the corporation itself, must be found to justify such a hiring." (Citing numerous authorities.) Nor is it at all clear that the oral agreement relied upon by appellant, which admittedly is wholly lacking in precision as to wages, working conditions and the character of work to be performed, can be made the subject of an action for damages for its breach, because it would seem that as respondent contends, no reasonable rule can be adopted for the measurement of the loss sustained by such breach. 48 L.R.A. (N.S.) page 435, note; Louisville & N. R. Co. v. Cox, 145 Ky. 667, 141 S.W. 389; Ogden v. Philadelphia & W. C. Traction Co., 202 Pa. 480, 52 A. 9; Ingram-Day Lumber Co. v. Rodgers, 105 Miss. 244, 62 So. 230, 48 L.R.A. (N.S.) 435, Ann. Cas. 1916E, 174. As held in Arentz v. Morse Dry Dock, etc., Co., 249 N.Y. 439, 164 N.E. 342, 62 A.L.R. 231, an agreement to employ a person for life is so unusual that although not required to be in writing, it should at least, to be enforceable in an action for damages, be specific and definite with little or no reason for misunderstanding. In this connection it may be stated that if in December, 1908, appellant, instead of quitting her employment, had been discharged, the conditions under which she was then working might have been sufficient to serve as a foundation for the fixing of a measure of damages to be applied for the breach. Rhoades v. Chesapeake & O. Ry. Co., 49 W.Va. 494, 39 S.E. 209, 55 L.R.A. 170, 87 Am.St.Rep. 826; Pierson v. Kingman Milling Co., 91 Kan. 775, 139 P. 394. But that is not the situation with which we are here dealing. As stated, appellant quit her job voluntarily in 1908, and did not seek re-employment until 1933. Necessarily, therefore, the breach of which she complains did not occur until she was refused re-employment, and the damage she seeks to recover is the loss of earnings following such breach. As declared by section 3301 of the Civil Code: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Consequently, if at the time of the breach the agreement sued upon was lacking in precision as to the amount of wages appellant was then and thereafter entitled to receive, the kind of work she was then and afterwards called upon to perform, and the conditions under which she was to be employed, it is difficult to see upon what basis the court could reasonably fix a rule for the ascertainment of the amount of damages to be awarded.

[2-4] Irrespective, however, of the soundness of the foregoing points, it is apparent that the trial court's ruling granting the nonsuit must be sustained upon the fifth ground urged by respondent. As stated in Corpus Juris, where a servant refuses to serve or voluntarily abandons the service, whether with or without justifiable cause, the contract of employment is terminated (volume 39, pp. 78, 79). In other words, the universal rule seems to be that a servant may leave his employment of his own accord, but if he does, his connection with the service ceases and he cannot insist on re-employment. Having left the employment voluntarily, the only way he can return to it is by making a new contract with his employer, who may or may not receive him back, as he sees fit. Douglas v. Metropolitan Life Ins. Co. (Mo.App.) 297 S.W. 87. See, also Phelps v. Fuchs & Lang Mfg. Co., 82 N.J.Law, 474, 81 A. 728. Here the evidence shows without dispute that appellant of her own accord quit her employment to be married, and stated at that time that she did not intend to work after her marriage; that the man she was to marry was opposed to her so doing. Consequently, having thus permanently quit her position, she abandoned all right to future employment under the alleged oral agreement; and after a lapse of nearly twenty-five years, there was no obligation on the part of respondent to reemploy her.

Appellant contends that the termination of her employment in the manner stated amounted to no more than taking a leave of absence with her employer's consent. But the evidence does not support such contention. Nowhere in the testimony is there a suggestion of a leave of absence. To the contrary, appellant repeatedly stated that she quit. But even though the circumstances of her leaving be construed as the taking of a leave of absence, she was required, nevertheless, in order to retain her rights under said agreement, to return to her employment within a reasonable time; and it cannot be successfully maintained that a period of twenty-four or twenty-five years was a reasonable time.

Upon the ground stated, the judgment in our opinion should be affirmed; and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

---

28 Cal.App.2d Supp. 782

U DRIVE & TOUR, LIMITED, v. SYSTEM AUTO PARKS, LIMITED.

Civ. A. 3691.

Appellate Department, Superior Court, Los Angeles County, California.

Sept. 1, 1937.

1. Bailment 🔑2

A transaction which consisted of the acceptance of an automobile for purpose of parking, the asking and receiving from driver the fee therefor, and giving such driver a portion of parking ticket bearing an identifying number, constituted a "bailment for hire."

[Ed. Note.—For other definitions of "Bailment for Hire," see Words & Phrases.]

2. Bailment 🔑31(1)

Where complaint states a cause of action for conversion by bailee, plaintiff makes a sufficient prima facie showing by proof of the bailment and subsequent refusal of bailee on demand to make delivery according to contract, and burden is then cast on bailee to explain his refusal.

3. Bailment 🔑31(1)

In action by bailor against bailee based on conversion, or on contract for failure to redeliver the property, bailee must justify his failure, and if he relies on the proposition that the property was lost by theft or fire without negligence on his part, he has the burden of so proving in order to rebut bailor's prima facie case.

4. Bailment 🔑31(1)

A bailor who sues bailee for loss of bailment from fire or theft and charges that loss was result of bailee's negligence has burden of proving such negligence.

5. Appeal and error 🔑931(3)

Where trial court rendered judgment for defendant and written findings of fact were waived, appellate court was bound to assume that every issue tenable to decision under the evidence and pleadings was resolved in favor of defendant.

6. Bailment 🔑14(1)

In action against proprietor of automobile parking lot for breach of bailment in failing to redeliver automobile which was left at parking lot at about 11:45 p. m. and called for within forty minutes thereafter, sign on side of lot bearing words "Close 12 P. M." and other signs reading "15¢ Till Midnite" and "50¢ extra for locked cars," all of which were not well calculated to give actual notice to potential bailors, were insufficient to establish substance thereof as a term of bailment contract in absence of evidence that motorist actually saw the signs.

7. Bailment 🔑14(1)

In action against proprietor of automobile parking lot for breach of bailment in failing to redeliver automobile which was left at parking lot at about 11:45 p. m. and called for within forty minutes thereafter, motorist was not bound by a general though not universal custom prevailing in that city for parking stations to close at or before midnight, with automobiles left on lot unattended after that hour with keys equally available to thief and owner, in absence of evidence that motorist was familiar with that custom.

8. Bailment 🔑14(1)

In action by owner of automobile against proprietor of automobile parking lot for breach of bailment in failing to redeliver automobile which was left by rentee thereof at parking lot, rights of owner were no less than those of rentee, as respects terms of bailment contract.

9. Contracts ⚷93(2)

A contract which is made by the delivery by one of the contracting parties to the other of a document in common form stating the terms by which the person delivering it will enter into the proposed contract, and which is accepted without objection by person to whom it is tendered is generally binding on such person regardless of whether he reads the document, or otherwise informs himself of its contents, as his act amounts to an acceptance of the offer made to him.

10. Bailment ⚷31(3)

In action against proprietor of automobile parking lot for breach of bailment in failing to redeliver automobile which was left at parking lot at about 11:45 p. m. and called for within forty minutes thereafter, evidence that caretaker of lot gave motorist a parking ticket which, among other printed matter, contained the words (in black ink) "We close" and then [in red ink] "12 P. M." and then (in black ink) "Not responsible for cars after closing time" authorized implied finding that by the contract of bailment it was agreed that bailee's responsibility should cease on the closing of the parking lot at 12 midnight.

11. Bailment ⚷12, 14(1)

The responsibility of a gratuitous bailee or a bailee for hire can be diminished or increased by contract.

12. Bailment ⚷31(3)

In action against proprietor of automobile parking lot for breach of bailment in failing to redeliver automobile, evidence that it was implied term of bailment contract that responsibility of proprietor should cease on the closing of its parking lot at midnight, and evidence that automobile was still on lot when caretaker thereof turned off the lights and left at approximately 12:20 on night in question supported finding that proprietor fully discharged terms of his contract and hence was not liable for subsequent disappearance of automobile and damage occurring to it between such time and time it was recovered.

Appeal from Municipal Court of City of Los Angeles; Wilbur C. Curtis, Judge.

Action by U Drive & Tour, Limited, against the System Auto Parks, Limited, as proprietor of an automobile parking lot, for damages for conversion and breach of bailment. Judgment for defendant, and plaintiff appeals.

Affirmed.

Saul J. Bernard, of Los Angeles, for appellant.

Thomas D. Mercola, of Los Angeles, for respondent.

SCHAUER, Judge.

[1] On or about the 28th day of February, 1936, at approximately 11:45 p. m., an automobile owned by plaintiff and, with its consent, being operated by one Hubert Lejeune, as rentee, was by the latter driven into defendant's auto park at 743 South Spring street, in Los Angeles. Defendant's employee, Liles, accepted such automobile for parking, asked and received from the driver, Lejeune, the sum of 15 cents as a fee therefor, and gave to him a portion of a parking ticket bearing an identifying number. This transaction constituted a bailment for hire. Beetson v. Hollywood Athletic Club (1930) 109 Cal.App. 715, 718, 293 P. 821. Lejeune immediately left the parking lot and upon returning within the next forty minutes found that the lot was dark, no attendant was present, and plaintiff's automobile had disappeared. Several days later the car was recovered, having been stripped of all removable parts, and abandoned. Plaintiff seeks to recover its reasonable costs laid out in pursuing, recovering, and reconditioning such automobile. The complaint is in two alternative counts, one alleging the plaintiff's damages as a result of defendant's asserted negligence and the other setting up the same damages as arising from a breach of a bailment for hire. The trial court found for defendant and plaintiff prosecutes this appeal maintaining in effect that as to count I the admitted or undisputed evidence establishes defendant's negligence as a matter of law and that upon the theory of count II, on proof by plaintiff of the fact of bailment and subsequent failure to deliver possession of the property on demand, the law imposed on defendant the burden of proving that such failure was occasioned, without negligence on its part, by causes reasonably beyond its power to control; that the defendant failed as a matter of law to

discharge the burden of proof so imposed on it.

[2-4] The law governing the burden of proof in such cases as those presented by the two counts now before us has been heretofore discussed by this court in an unpublished opinion, prepared by Presiding Judge Shaw, which we now adopt in part in expression of our views herein. "The complaint contains sufficient allegations to state a cause of action for conversion of plaintiff's automobile by defendant, a bailee thereof. Where such a cause of action is stated, the plaintiff makes a sufficient prima facie showing by proof of the bailment and subsequent refusal of defendant, on demand, to make delivery according to the contract, and this casts on the defendant the burden of explaining his refusal. Wilson v. S. P. R. R. Co., 62 Cal. 164, 172; Cussen v. So. Cal. Sav. Bk., 133 Cal. 534, 537 [65 P. 1099, 85 Am.St.Rep. 221]; Taussig v. Bode, 134 Cal. 260, 263 [66 P. 259, 54 L.R.A. 774, 86 Am.St.Rep. 250]; Dieterle v. Bekin, 143 Cal. 683, 688 [77 P. 664]; Wilson v. Crown Tr. Co., 201 Cal. 701, 706 [258 P. 596]; Doot v. Skirving W. Co., 202 Cal. 75, 78 [259 P. 81]; Atwood v. So. Cal. Ice Co., 63 Cal.App. 343, 346 [218 P. 283]; Greer v. L. A. Athl. Club, 84 Cal.App. 272, 283, 284 [258 P. 155]; Ferguson v. Green, 99 Cal.App. 641, 643 [278 P. 1058]. According to some cases, as soon as it appears that the property has been stolen or destroyed by fire, the burden shifts to plaintiff to show that negligence of defendant caused or contributed to the loss. Wilson v. S. P. R. R. Co., supra; Taussig v. Bode, supra; Atwood v. So. Cal. Ice Co., supra; Perera v. Panama-Pac. I. E. Co., 179 Cal. 63, 64 [175 P. 454]; England v. Lyon, etc., Co., 94 Cal.App. 562, 567 [271 P. 532]. But it now seems settled that where the plaintiff's action is strictly one of conversion, or upon the contract for failure to redeliver the property, the defendant must justify his failure, and if he relies upon the proposition that the property was lost by theft or fire without negligence on his part, the burden is on him to prove these facts, including his lack of negligence, in order to rebut the prima facie case of plaintiff. Cussen v. So. Cal. Sav. Bk., supra; Dieterle v. Bekin, supra; Wilson v. Crown Tr. Co., supra (which overrules Atwood v. So. Cal. Ice Co., on this point); Greer v. L. A. Athl. Club, supra; Ferguson v. Green, supra.

"Under the rule settled in Wilson v. Crown Tr. Co., if plaintiff alleges a loss by fire or theft, and charges this was due to defendant's negligence, the burden is on plaintiff to prove such negligence. See, also, Wilson v. Calif. C. R. R. Co., 94 Cal. 166, 172 [29 P. 861, 17 L.R.A. 685]. So it seems that the answer to the question, on whom is the burden of proof as to defendant's negligence, depends on the pleadings." It follows, therefore, from the form of the complaint in this case, that as to count I the burden of proving negligence is on the plaintiff, while as to count II, the bailment and failure or inability to redeliver upon demand being admitted, the burden devolved on the defendant to establish its own lack of fault in the premises. If defendant prevails as to count II, obviously plaintiff cannot make out a case on count I. Hence we consider the case as arising upon count II first.

[5] Since the trial court rendered judgment for defendant, and since written findings of fact were waived, we are bound to assume that every issue tenable to decision under the evidence and pleadings was resolved in favor of defendant. Material to the case are the terms of the contract of bailment. Admittedly, no word was spoken by either party to the transaction when plaintiff's automobile was left with defendant's attendant (except perhaps to state the parking fee), but defendant seeks by three avenues to introduce into the contract an agreement that its responsibility as bailee should terminate at 12 o'clock midnight. The three avenues sought to be traversed by defendant are as follows:

[6] First, defendant calls our attention—while conceding that it did nothing to direct Lejeune's attention—to a small sign appearing inconspicuously (according to a photographic exhibit) on the north side of its lot, reading "Close 12 P.M." The striking contrast in size and prominence of display accorded by defendant to signs advertising its name and business as measured with the physically modest and psychologically comparatively concealed words "Close 12 P.M.," as to this phase of the defense, suggests an effort on defendant's part technically to comply with a city ordinance mentioned in the testimony as requiring the posting of a stated closing time rather than ordinary care in good faith to acquaint its customers with the fact that their cars would be left unlocked (or with keys equally available to thief and owner) and unattended after midnight. Likewise the other signs reading "15¢ Till Midnite" and "50¢ extra for locked cars," in their substance and manner of display,

are not well calculated to give any actual notice to potential bailors of facts material here. There is no evidence tending to show that Lejeune saw any of the signs referred to and he testified positively that he did not see them. We do not find, in the circumstances disclosed by the record in this case, that defendant has sustained the burden assumed by it of establishing as a term of the bailment contract the substance of any closing sign posted on the parking lot.

[7, 8] As a second method of establishing a contractual limitation in the conceded bailment, defendant produced evidence sufficient to establish that there was a general, but not universal, custom or usage (for definitions and distinction, see 25 Cal.Jur. p. 418) prevailing in Los Angeles for parking stations, of the type with which we are here concerned, to close at or before 12 midnight; such evidence also would have warranted the trial court in finding that plaintiff *but not the rentee Lejeune,* was familiar with that custom. Since Lejeune was not shown to have been engaged in the parking of automobiles as a business and as the custom or usage was not universal, he is not bound by the same in the absence of evidence that he had knowledge of it. Lynch v. Bekins Van & Storage Co. (1916) 31 Cal.App. 68, 71, 159 P. 822. Plaintiff's rights in this case, as the owner of the automobile, are no less than those of its rentee, Lejeune.

[9] As its third ground for contending that its responsibility as bailee was limited by special contract, defendant points out that at the time of the inception of the bailment Lejeune was handed a "parking ticket" or "claim check" containing, among other printed matter, the following words (in red ink): "743 So. Spring St. [in black ink] We Close [in red ink] 12 P.M. [in black ink] *Not Responsible for Cars After Closing Time.*" Defendant admits that nothing was said or done, beyond the mere fact of handing him the piece of cardboard, to direct Lejeune's attention to such printed matter or any portion thereof. There was, however, evidence that the parking lot was well lighted (by four 1000-watt lamps and some forty-five 60-watt lamps) and that Lejeune accepted without objection and retained such ticket. The trial court impliedly found that the circumstances disclosed afforded him a reasonable opportunity to read the printed matter thereon and accordingly that he became bound by it as a part of the bailment contract. Regarding a receipt given by the proprietor of a warehouse, the Supreme Court said: "It was the duty of respondents to take note of its contents, if they had the opportunity, and their opportunity was ample. The presumption, therefore, is that they did read it." Taussig v. Bode & Haslett (1901) 134 Cal. 260, 266, 66 P. 259, 260, 54 L.R.A. 774, 86 Am. St.Rep. 250. In Curtis v. United Transfer Co. (1914) 167 Cal. 112, 114, 138 P. 726, 727, the Supreme Court said, "It is true, as a general rule, that a shipper or consignor who accepts a bill of lading or receipt containing the terms of a contract of carriage from the carrier without objection assents to it and is bound by its terms whether he has knowledge of them or not, under the rule of constructive notice." On the same general subject the District Court of Appeal for the First Appellate District (Division 2), speaking through Presiding Justice Langdon (now Associate Justice of the California Supreme Court) stated the rule as follows: "A great number of contracts are made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, regardless of whether he reads the document, or otherwise informs himself of its contents." Cunningham v. International Committee Y. M. C. A. (1921) 51 Cal.App. 487, 490, 197 P. 140, 141.

[10-12] Upon the above-mentioned evidence, we cannot say as a matter of law that the trial court was unjustified in its implied finding that by the contract of bailment it was agreed (impliedly) that defendant's responsibility as bailee should cease upon the closing of its park at 12 midnight. In Kaye v. M'Divani (1935) 6 Cal.App.(2d) 132, 135, 44 P.(2d) 371, 373, it is declared "That the responsibility of a gratuitous bailee or a bailee for hire can be diminished or increased by contract is settled." See, also, Klein v. Baker (1931) 112 Cal.App. 157, 162, 296 P. 631; Ambassador Airways, Inc. v. Frank (1932) 124 Cal.App. 56, 63, 12 P.(2d) 127. Defendant's representative, Liles, testified that plaintiff's automobile was still on the

lot when he turned off the lights and left at approximately 12:20 on the morning of February 29, 1936. This evidence is legally sufficient to support the implied finding that defendant fully discharged the terms of its contract.

The judgment is affirmed, respondent to recover its costs of appeal.

We concur: SHAW, P. J.; SHINN, Judge pro tem.

9 Cal.2d 544

MILLER et al. v. LANTZ et al.

L. A. 15226.

Supreme Court of California.

Sept. 8, 1937.

1. Appeal and error 🔑907(2)

Where appeal was taken upon record consisting of judgment roll and a bill of exceptions containing only pleadings and a few of notices and orders, entirely omitting the evidence and the instructions, reviewing court was required to presume that evidence supported judgment.

2. Appeal and error 🔑1039(2)

In attorneys' action for services performed under a written contract, any alleged uncertainty in the complaint could not be considered prejudicial error after a complete trial on merits, particularly where evidence was not brought before reviewing court.

3. Attorney and client 🔑144

A contract, by which attorneys were to assist their client in trial of a certain case for a retainer of $800 and $100 for each day required to be away from their office, or engaged in the case until close of case in superior court, the employment not to involve any additional service beyond the superior court was reasonably susceptible of interpretation that charge of $100 a day was to apply to other work done by attorneys away from their office in addition to time spent in the superior court.

4. Reformation of instruments 🔑37

A cross-complaint, by which executors for client sought reformation of contract

for employment of attorneys because of alleged mistake of client as to extent to which contract obligated him, was deficient in failing to allege diligence sufficient to excuse delay of nearly two years in discovering the alleged mistake.

5. Reformation of Instruments ⚷37

A cross-complaint, by which executors for client sought reformation of contract for employment of attorneys on ground of mistake of client as to extent to which contract obligated him, was deficient in failing to allege that client was prevented from reading contract, or from fully comprehending meaning of language used.

6. Reformation of Instruments ⚷37

A cross-complaint, by which executors of client sought reformation of contract for employment of attorneys on ground of mistake of client as to extent to which contract obligated him, was deficient in absence of adequate allegations of knowledge thereof on part of attorneys in view of cross-complaint pleading simply a unilateral mistake.

7. Attorney and client ⚷144

The rule that any ambiguity in a contract between an attorney and his client is to be resolved against the attorney does not apply to the original contract of employment.

8. Appeal and error ⚷907(2)

Where there was no evidence before the reviewing court on appeal from judgment for attorneys in action for services rendered under a written contract, the reviewing court was required to presume that circumstances surrounding the making of the contract as well as its practical construction by acts of the parties, all of whom were attorneys, would determine question of concealment or disclosure of facts as between attorneys and their client.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by K. A. Miller and another against Charles Lantz, wherein Charles Chapman Lantz and another, as executors of the last will and testament of Charles Lantz, deceased, were substituted as defendants upon the death of Charles Lantz. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

For prior opinion, see 64 P.(2d) 754.

Oliver O. Clark, and Winslow P. Hyatt, both of Los Angeles, for appellants.

W. A. Alderson and Miller & Ellis, all of Los Angeles, for respondents.

LANGDON, Justice.

This action was commenced June 16, 1930, to recover a balance due for services performed under a written contract. The defendant Charles Lantz, an attorney, was engaged in the trial of a case, and employed plaintiffs K. A. Miller and Herbert N. Ellis, attorneys, to assist him in the trial. The agreement was evidenced by a letter dated May 3, 1926, from Lantz to plaintiffs, reading in part as follows: "This is to advise you that I employ you as attorneys to assist me in the trial of the case of Broome v. Lantz, No. 10149 in the Superior Court of Ventura County and agree to pay you a retainer of $800.00, plus the sum of $100.00 per day for each day required to be away from your office or engaged in the said case until the close of same in the Superior Court. This employment is not to involve any additional services beyond the Superior Court; if further services are required same to be an additional contract therefor." The letter also stated: "I agree to pay all expenses incurred by you and deemed necessary for the proper preparation of said case while away from your office or incurred in connection with the trial of said case, including any witnesses and expenses you deem necessary. * * *"

With the complaint plaintiffs filed a bill of particulars, setting forth the following important items: Preparation for trial in plaintiffs' office, 3 days, $300; trial, 6 days, $600; preparation of brief, 31 days, $3,100. Other items are stated, such as preparation of motion and affidavit for disqualifying judge, and various conferences and consultations. All were charged at the rate of $100 per day. The total amount claimed was $5,068.70, and the alleged balance due was $4,618.70. A jury trial was had, lasting for nine days, and thereafter the jury brought in a general verdict, upon which judgment was given for plaintiffs in the sum of $3,500. During the course of the trial the defendant died, and appellants, his executors, were substituted as defendants.

[1] The appeal was taken upon a record consisting of the judgment roll and a bill of exceptions, containing only the pleadings

and a few notices and orders, and omitting entirely the evidence given at the trial, the instructions, and the evidence presented at the hearing of the motion for new trial. Accordingly it must be presumed that the evidence fully supports the verdict and judgment. Myers v. Canepa, 37 Cal.App. 556, 174 P. 903, 906. As to the alleged errors in law, there are but two which require notice.

The first is that the demurrer to the complaint should have been sustained on the ground that the same was ambiguous in alleging the authority to perform services in addition to the actual participation in the trial of the cause in the Ventura superior court. It is incidentally urged that the contract itself is void for uncertainty in this respect. The theory of appellants seems to be that the only definite elements of the agreement are those calling for the $800 retainer, and for the sum of $100 per day for each day in which plaintiffs were to be "engaged" in the actual trial. For the other services it is argued that special request or authority was necessary.

[2, 3] It should be noted here that while defendants filed a general demurrer to the original complaint, plaintiffs thereafter filed an amended complaint to which only a special demurrer was interposed. This special demurrer was heard and overruled. Thereafter defendants filed their answer containing both denials and affirmative defenses, and the trial was had on all of the above-mentioned issues. It is manifest that any alleged uncertainty in the complaint cannot be considered prejudicial error after a full and complete trial on the merits (Baker v. Miller, 190 Cal. 263, 212 P. 11), particularly when, as here, none of the evidence is brought before us. Myers v. Canepa, supra; Sledge v. Stolz, 41 Cal. App. 209, 182 P. 340. Moreover, the contract on its face is reasonably susceptible of the interpretation that the charge of $100 per day was to apply not only to time spent in the superior court at Ventura, but also to other work done by plaintiffs away from their office. Such is the obvious meaning of the words: "for each day required to be away from your office, *or* engaged in said case." And the words "beyond the Superior Court" seem to have the same object as "until the close of same in the Superior Court," namely, to restrict the employment under this particular contract to the time during which the case is pending in the superior court. Appellants' suggestion that this language, coupled with the provision "assist me in the trial * * * in the Superior Court of Ventura County," restricts the compensation to time spent at the superior court in Ventura, ignores the rest of the terms of the agreement. The amended complaint clearly alleges services performed under and pursuant to the contract. The special demurrer was therefore properly overruled.

[4-6] The other asserted error is in the action of the trial court in sustaining plaintiffs' demurrer to defendant's cross-complaint. The cross-complaint, filed in October, 1930, sought reformation of the contract based upon an alleged mistake of the defendant Lantz, namely, that he did not know that the contract purported to obligate him to pay to plaintiffs $100 a day for services outside their offices, and that he first obtained such knowledge on March 8, 1928, when a bill was rendered to him. It is further alleged in the cross-complaint that Lantz had complete confidence in plaintiffs, and was ill and distressed at the time he signed the contract. The demurrer pleaded the statute of limitations and laches, and the court's order sustaining the same was not, in our opinion, erroneous. The cross-complaint was lacking in any allegations of diligence sufficient to excuse the long delay in discovering the alleged mistake, amounting to nearly two years. See Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268. Nor is there any showing that Lantz was prevented from reading the contract or from fully comprehending the meaning of the language used. Moreover, the cross-complaint pleads a simple unilateral mistake, and in the absence of adequate allegations of knowledge thereof on the part of plaintiffs, it is insufficient. See Goodfellow v. Barritt, 130 Cal.App. 548, 20 P.(2d) 740; Harding v. Robinson, 175 Cal. 534, 166 P. 808; American Building Maintenance Co. v. Indemnity Insurance Co., 214 Cal. 608, 7 P.(2d) 305.

[7, 8] The further suggestion that any ambiguity in the contract is to be resolved against plaintiffs under the rule respecting dealings of an attorney with his client may be answered, first, by noting that this rule does not apply to the original contract of employment (Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981); and, second, that the circumstances surrounding the making

of the contract, as well as its practical construction by acts of the parties, all of whom were lawyers, which would determine the question of concealment or disclosure of the facts, were presumably given at the trial, and appellants have not seen fit to bring the evidence before us.

The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.; SHENK, J.; NOURSE, Justice pro tem.

EDMONDS, J., having presided at some of the proceedings in this case in the court below, does not participate in this decision.

---

9 Cal.2d 549

BRICK et al. v. CAZAUX et al.

L. A. 16261.

Supreme Court of California.

Sept. 15, 1937.

1. Eminent domain 🔑320

In condemnation proceedings, title to property condemned does not vest in public until payment has been made, as required by verdict of jury or judgment of court, and copy of final order of condemnation has been filed for record in office of county recorder of county in which condemned property is situated (Code Civ.Proc. § 1253).

2. Eminent domain 🔑153

Where property is purchased which is subject to pending condemnation proceedings, and deed conveying such property is silent as to award money to be paid in proceedings, money belongs to and is payable to purchaser (Code Civ.Proc. § 1253).

3. Dedication 🔑53

When dedication of private land for street purposes is complete, property becomes public property and owner loses all control over it, or right to its use (St.1929, p. 1790).

4. Dedication 🔑38

After dedication is complete by owner's act, whether express or implied, it is thereafter irrevocable by him, and effect of such dedication cannot be qualified by any act or declaration thereafter made on his part (St. 1929, p. 1790).

5. Eminent domain 🔑158

Person claiming to be entitled to moneys awarded as compensation for condemnation of property must establish interest or estate in thing condemned (Const. art. 1, § 14).

6. Eminent domain 🔑158

Vendees' complaint against vendor to recover money awarded in condemnation proceedings, wherein final judgment of condemnation had been entered after sale, *held* demurrable, where complaint alleged statutory dedication of property condemned prior to condemnation judgment, since vendees were not owners of property condemned so as to entitle them to award (Code Civ.Proc. § 1253; St.1929, p. 1790; Const. art. 1, § 14).

7. Pleading 🔑225(1)

Motion for leave to file proposed amendments, after demurrer to complaint had been sustained, was properly denied where amendment did not allege any facts different from those pleaded in the complaint with reference to such portions as had rendered complaint demurrable.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Frank J. Brick and others against John Cazaux and another. From a judgment of dismissal, the plaintiffs appeal.

Affirmed.

For prior opinion, see 64 P.(2d) 155.

Fred N. Arnoldy, of Los Angeles, for appellants.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 1 [64 P.(2d) 155]. Upon further consideration, we are satisfied that the said court has correctly determined the issues presented herein, and we accordingly adopt the opinion of Mr. Justice pro tempore White as the opinion of this court. It reads as follows:

"This is an appeal from a judgment of dismissal entered by the trial court after sustaining defendants' demurrer to an amended complaint without leave to amend. We are also asked to review the order of the court thereafter made denying plaintiffs' motion to further amend their amended complaint in the manner and form proposed by the motion.

"The demurrer was based on the grounds that the amended complaint failed to state a cause of action; that the action was barred by the statute of limitations (subdivision 1, section 339, and section 338, Code Civ.Proc., as amended by St.1933, p. 878); and that the amended complaint was indefinite and uncertain in stated particulars.

"The amended complaint charged that on July 3, 1928, defendant Cazaux, as the owner of the parcel of land therein described, sold the same to Grosvenor Inglis Corporation under an executory contract of sale for the sum of $53,900, payable in installments as therein specified. The contract of sale is annexed to the amended complaint, marked 'Exhibit A.' It was further charged that the vendee made the initial payment, went into possession, and thereafter continued to make the subsequent payments as specified in the contract. It was then averred that on and prior to September 22, 1928, the vendee under said contract entered into negotiations with the plaintiffs Frank J. and Helen A. Brick for the sale to the latter of the vendee's interest under the executory contract, culminating in an escrow agreement on September 22, 1928, marked 'Exhibit B,' and annexed to the amended complaint. This agreement called for the assignment of the vendee's interest under the contract to the plaintiff Citizens National Trust & Savings Bank upon payment to the vendee under said contract of sale of a specified sum and the assumption of the unpaid balance of the purchase price due under the contract. It was then alleged that pursuant to said escrow agreement, the vendee delivered to the bank its executed copy of the contract of sale, together with an assignment in due form of the vendee's rights thereunder. The amended complaint alleged that the closing of the escrow was, by the terms of the escrow agreement, made contingent upon the procuring of defendant Cazaux' consent to the conveyance to the plaintiff bank of said parcel of land, to be held by the bank for the benefit of plaintiffs Brick and wife under a trust indenture thereafter to be arranged, so as to secure the payment to defendant Cazaux of the unpaid balance of the purchase price. The amended complaint then sets forth that after protracted negotiations were carried on between Brick and Cazaux, they failed to come to terms, whereupon Brick arranged for the payment to Cazaux of the entire unpaid balance of the purchase price, and thereafter, on July 19, 1929, the vendee under the said contract of sale, 'with the intent and for the purpose of consummating the sale to the plaintiffs Frank J. Brick and Helen A. Brick of its interest as vendee under said agreement * * * as contemplated by said escrow agreement,' gave to the depositary its amended escrow instructions, pursuant to which Cazaux, by a grant deed dated July 17, 1929, and recorded August 6, 1929, a copy of which is attached to the amended complaint, marked 'Exhibit C,' conveyed the parcel of land in question to the plaintiff bank, the latter acting as trustee under a subdivision trust theretofore created by and for the benefit of plaintiffs Brick and wife. The amended complaint further alleged that concurrently therewith Cazaux delivered to the plaintiff bank a receipt acknowledging 'full settlement and satisfaction' of the contract.

"The amended complaint then charged that prior to this conveyance, but subsequent to the execution of the executory contract of sale on July 3, 1928, to wit, on December 5, 1928, a condemnation proceeding was commenced under the 'Acquisition and Improvement Act of 1925' [St. 1925, p. 849], to take for street purposes a 100-foot strip bisecting the parcel of land here in question. It was then averred that on November 19, 1929, an interlocutory judgment and decree was entered in said condemnation proceeding confirming an award of $4,880 for the taking of that portion of the parcel of land sought for street purposes; that thereafter, on October 24, 1930, an amount sufficient to pay said award having been deposited in court, a final judgment of condemnation was entered therein.

"The amended complaint further charged that defendant Cazaux was made a party defendant in the condemnation proceedings, and suffered his default to be entered therein; that neither the vendee under the executory contract of sale nor any of the plaintiffs herein were joined as parties in said condemnation proceedings; that none of the plaintiffs herein had any knowledge or notice of the fact that an award had been made in said condemnation proceedings; and that plaintiffs did not ascertain or discover that fact until on or about April 20, 1935. The amended complaint further averred that although plaintiffs knew as a matter of general knowledge of the proposed extension of said street, and that the proposed route thereof would bisect the parcel of land here in question, plaintiffs had no knowledge of any of the orders made or steps taken in said proceedings and did not anticipate, expect or know that any award would be made therein for the taking of said portion of the land, for the reason, alleged in the amended complaint, that plaintiffs intended to and did cause to be filed a subdivision map of said parcel of land, designating thereon as a public street that portion thereof sought to be taken under the condemnation proceedings.

"The amended complaint then proceeds to allege that on or about November 7, 1932, more than three years after the date of Cazaux' conveyance of the property in question to plaintiff bank, Cazaux was informed by 'One Doe,' a professional searcher of records, that the award in question had been made and was still on deposit in court. The amended complaint then charges that the defendants entered into a conspiracy for the purpose of wrongfully and fraudulently procuring the payment and distribution to themselves of the said award, and concealed the facts with respect thereto from the plaintiffs. It is then alleged that with full knowledge of all the facts charged in the amended complaint, and well knowing that the defendant Cazaux was not entitled to the said award and the whole thereof, and without the knowledge or consent of the plaintiffs, the defendants wrongfully and fraudulently procured the payment of said award, together with accrued interest thereon, in the total and aggregate sum of $5,083.12, to John Cazaux. The amended complaint then alleges that said sum so obtained was divided between the defendants. The amended complaint then alleges that plaintiffs herein were without knowledge of the making or payment of the award in question until April 20, 1935, and proceeds to set out the means by and through which plaintiffs obtained knowledge.

[1, 2] "In urging a reversal of the judgment, appellants earnestly contend that the amended complaint stated a cause of action, for the reason that it alleged that defendant Cazaux, having received full payment of the entire purchase price for the property in question in July, 1929, more than three years prior to the collection of the award, was without any right to receive the same, and that plaintiffs, as the purchasers of the property in question, were entitled to the award. In condemnation proceedings, the title to the property condemned does not vest in the public until payment has been made as required by the verdict of the jury or judgment of the court and a copy of the final order of condemnation has been filed for record in the office of the county recorder of the county in which the condemned property is situated. Code Civ. Proc. § 1253. In the instant case, the allegations of the amended complaint clearly show that defendant Cazaux executed his deed conveying absolute title in the property to the plaintiff bank while the condemnation proceedings were pending; and the universal rule appears to be that where property is purchased which is subject to pending condemnation proceedings and the deed conveying said property is silent as to the award money to be paid in the proceedings, said money belongs to and is payable to the purchaser. Security Co. v. Rice, 215 Cal. 263, 266, 9 P.(2d) 817, 82 A.L.R. 1059; Obst v. Covell, 93 Minn. 30, 100 N.W. 650; Hull v. Phillips, 128 Mo. App. 247, 107 S.W. 21; Gates v. De La Mare, 142 N.Y. 307, 37 N.E. 121; Virginia-Carolina Ry. Co. v. Booker, 99 Va. 633, 39 S.E. 591; Lewis on Eminent Domain (3d ed.) §§ 894, 895; Price v. Engelking, 58 Ill.App. 547, 552. When, therefore, respondent Cazaux, during the pendency of condemnation proceedings, conveyed these premises to plaintiffs, he conveyed all the rights which he had growing out of the ownership of this property. If nothing further was done by the county with reference to the street improvements ordinarily plaintiff grantee would have remained the owner which respondent Cazaux' deed made it. After the county pays into court the amount of the judgment, the grantee, if it retains title to the property, is entitled to such money. It was paid for the grantee's land, its title, its possession, and not that of the respondent Cazaux.

[3-6] "Respondents contend, however, that in the instant case the demurrer to the amended complaint was properly sustained without leave to amend because of the al-

legations therein contained to the effect that plaintiffs, on September 11, 1929, caused to be filed and recorded a subdivision map of the said parcel of land, designating thereon as a public street or highway that portion thereof consisting of the 100-foot strip of land in question, and showing the same on said map as a section or portion of Slauson avenue. We are cited by respondents to the California Statutes of 1929, page 1790 (Deering's General Laws, Act 4578), wherein provision is made for the dedication of portions of private subdivision lands for street purposes, and which act was in effect at all times subsequent to August 14, 1929. It appears to be the rule in this state that whenever the dedication is complete the property becomes public property, and the owner loses all control over it or right to its use; that after the dedication is complete by the owner's act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part. Archer v. Salinas City, 93 Cal. 43, 51, 28 P. 839, 16 L.R.A. 145. Respondents contend that appellants, having pleaded in their amended complaint a statutory dedication on September 11, 1929, which was prior to the entry of the interlocutory judgment in the condemnation proceedings, were not, therefore, on the date of the entry of the interlocutory judgment, November 19, 1929, the owners of the easement condemned in the condemnation proceedings, and they were therefore not entitled to the condemnation award. It is unquestionably sound, as an abstract principle of law, that a person claiming to be entitled to moneys awarded as compensation for the condemnation of property must establish an interest or estate in the thing condemned. The provision of our Constitution (article 1, § 14) provides that compensation for the taking of private property shall be paid to the owner. It seems to us that under the allegations of appellants' amended pleading they failed to sustain the foundational requirements necessary to state a cause of action, in that they not only failed to plead that upon the date of the taking of the property for public purposes they were the owners thereof, but they have affirmatively pleaded that prior to the entry of the interlocutory judgment they divested themselves of the ownership of the particular property condemned in the condemnation proceedings. This, in our opinion, deprives them of the right to challenge in this action the receipt of the award by the respondent John Cazaux, because it is undoubtedly the rule that compensation in general must be paid to the person who owned the property at the time it was taken or injured. People v. Joerger, 12 Cal.App.(2d) 665, 55 P.(2d) 1269. The demurrer to the amended complaint was therefore properly sustained without leave to amend.

[7] "In the amendments proposed to the amended complaint through motion made after sustaining of the demurrer without leave to amend, appellants did not allege any facts different from those pleaded in the amended complaint with reference to the dedication by them for public purposes of the property around which the action of condemnation centered; for which reason the motion for leave to file the proposed amendments was properly denied.

"The foregoing conclusions at which we have arrived render it unnecessary to consider or decide other points raised.

"For the foregoing reasons, the judgment from which the appeal herein is taken is affirmed."

---

22 Cal.App.2d 539

COOK et al. v. PARKER et al.

Civ. 2017.

District Court of Appeal, Fourth District, California.

Sept. 16, 1937.

1. Appeal and error 🔑1071(5)

Defects in fact findings do not necessarily require reversal of judgment based thereon if there are proper findings supporting judgment and improper findings are not necessary to support of judgment.

2. Appeal and error 🔑1071(6)

Failure to find on an issue raised by complaint is not fatal to judgment where finding, if made, would not have required reversal.

3. Appeal and error 🔑1071(5)

Trial court's failure to make findings on immaterial matter is not prejudicial.

4. Appeal and error ⟹1071(5)

In action to cancel note, where trial court found that note was procured by third party's fraud, judgment for holder of note would not be reversed where trial court also found that holder, who made loan represented by note, was not interested in business concerning which fraudulent statements were made, and did not join in fraud.

5. Bills and notes ⟹103(1)

Where payee of note who made loan represented thereby did not participate in third party's fraudulent statements inducing maker to borrow money for investment in third party's business, third party's fraud was not chargeable to payee.

6. Bills and notes ⟹92(1)

One who borrowed money for investment in business, relying on false representations concerning business, and gave note to lender of money, who did not participate in false representations, received valuable consideration for note.

7. Bills and notes ⟹57

In action by husband and wife to cancel note, judgment for holder of note would be sustained as against contentions that wife did not sign note until after husband had executed note and received proceeds thereof, and that hence wife received no consideration therefor, where finding justified assumption that husband promised to secure wife's signature before he signed note and received proceeds, and that wife promised to sign note before its execution.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Charles P. Cook and Mary W. Cook against Leslie F. Parker and Luella M. Kaer. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Bryan Woodson, of Los Angeles, for appellants.

Harry C. Clark, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of defendants in an action wherein plaintiffs sought recovery under the allegations of a complaint containing five separate causes of action which are described in their brief as follows: "The first cause of action was for cancellation of a $500.00 promissory note by reason of failure of consideration. The second cause of action was for cancellation of the note by reason of no consideration. The third cause of action was for rescission of a contract whereby Charles P. Cook agreed to invest $500.00 in the Mission Dairies Association, and for rescission and cancellation of said $500.00 note by reason of the fraud of the defendants, which induced the plaintiff Charles P. Cook to enter into said agreement, and which induced both plaintiffs to sign said $500.00 note. The fourth cause of action was for reformation of the contract to conform to the alleged agreement that the $500.00 note was to be paid solely out of the earnings of the Mission Dairies Association. The fifth cause of action was for a declaration of the rights of the parties." We will assume that each count of the complaint states facts sufficient to constitute a cause of action. The appeal is taken upon the judgment roll alone.

Plaintiffs base their attack on the judgment upon the ground of the alleged insufficiency of the findings of fact and conclusions of law to support the judgment. Their arguments are made under the counts of their complaint wherein they attempted to allege fraud in the execution of the promissory note and lack of consideration for it. They seem to have abandoned their other causes of action which consequently will receive no further attention here.

Plaintiffs allege that defendants were associated together in the ownership and operation of the Mission Dairies Association; that they solicited Charles P. Cook to invest $500 in this business and made false and fraudulent representations to him to induce him to do so; that defendant Kaer loaned him $500 for which she took his promissory note; that Cook signed this note and received the money from Mrs. Kaer on the 20th day of December, 1934; that on the following day Mary W. Cook, the wife of Charles P. Cook, signed the note without any further consideration.

The trial court found that Mrs. Kaer was not a partner nor an associate in the business of Parker; that she was not interested in the Mission Dairies Association; that she made no false, fraudulent, or untrue representations to Cook; that before the note was delivered Cook agreed to have his wife sign it; that Mrs. Kaer, as consideration for the note, paid plaintiffs $500.

Plaintiffs urge that the findings are contrary to admissions in the pleadings; that they are in an admittedly conjunctive form which is defective; that there is no finding in response to the undenied allegations of fraud on the part of Parker.

[1-3] These charges are largely true. While the findings are unfortunately drawn, these defects do not necessarily require a reversal of the judgment if there are proper findings supporting it and the improper findings are not necessary to its support. The failure to find on an issue raised by the complaint is not fatal to the judgment where the finding, if made, would not have required a reversal. The failure to find on an immaterial matter is not prejudicial.

[4, 5] The trial court did properly find that Mrs. Kaer was not interested, either as part or sole owner or manager or otherwise, in either of the dairy businesses described in the complaint; that she made no false or fraudulent representations to Cook and did not join in any. With these findings made, fraud, if any, on the part of Parker becomes immaterial and constitutes no sufficient ground for a reversal of the judgment. The promissory note sought to be canceled was given by plaintiffs to Mrs. Kaer. Parker was not a party to it and was not acting with or for Mrs. Kaer. The money was furnished by Mrs. Kaer. Therefore, any fraud on Parker's part cannot be charged to Mrs. Kaer. It follows that we may assume fraud on the part of Parker and still be unable to reverse the judgment because Mrs. Kaer, the payee and holder of the note and the real party in interest in the action to cancel it, was absolved from the charges of fraud by sufficient findings of the trial judge.

[6] A mere statement of the facts of the case demonstrates that Cook received a valuable consideration for the execution of the note. This is not seriously questioned by his counsel. He does argue that there was no consideration flowing to Mrs. Cook because she signed the note after its execution by her husband and after he had received the money for it.

[7] This contention is effectively answered in the case of Winders v. Sperry, 96 Cal. 194, 31 P. 6, 7, where, under similar facts, the Supreme Court said:

"It is true, in general, that one who adds his signature to a promissory note after its execution and delivery is not bound unless there is a new consideration. But this is not that case [here]. The execution and delivery were not complete until it was signed by appellant.

"But if we are bound to conclude that it had been executed and delivered as to one of the makers, there was a consideration for the subsequent signature of the appellant. As the contract was that he should sign the note, and the note was accepted only upon that understanding, the payee could have canceled it or tendered it back if appellant had refused to sign, and maintained a suit at once for his money.

"The note was payable one year after date, and the credit was given on the promise and in consideration of appellant's signature. Had he not signed the note this consideration would have failed.

"But while the general rule as to a signature obtained after the execution and delivery of the note is as above stated, it has been held where the borrower promises at the time of the loan, and the execution and delivery of a note, signed by himself alone, that he will procure another signature, that the person so signing afterwards is bound; that the subsequent signature is not without consideration."

In the absence of the evidence, if it were necessary to support the judgment, we might assume that the evidence showed that Mr. Cook, before he signed the note and received the money, promised to secure his wife's signature to it, and also that before its execution Mrs. Cook promised to sign it, which promise was a part of the consideration upon which Mrs. Kaer parted with her money. It follows that the note is supported by ample consideration flowing to both plaintiffs.

Judgment affirmed.

I concur: JENNINGS, Acting P. J.

22 Cal.App.2d 525

PEOPLE v. LEACH.

Cr. 3011.

District Court of Appeal, Second District, Division 2, California.

Sept. 15, 1937.

Hearing Denied by Supreme Court Oct. 14, 1937.

1. Criminal law ⚷982

A convicted defendant is not entitled to be placed on probation as a matter of right, but power to grant probation may be exercised in discretion of court (Pen.Code, § 1203 et seq., as amended and added by St.1935, p. 1706 et seq.).

2. Criminal law ⚷982

"Probation" is an act of grace and clemency which may be granted by the trial court to a seemingly deserving defendant whereby such defendant may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted (Pen.Code, § 1203 et seq., as amended and added by St.1935, p. 1706 et seq.).

[Ed. Note.—For other definitions of "Probation," see Words & Phrases.]

3. Criminal law ⚷982

The vacation of an order admitting a defendant to probation was proper where, although defendant was not charged with a prior conviction of a felony, trial court, in passing on application for probation, had before it the record of defendant's prior conviction for burglary showing that defendant had been placed on probation, probation had terminated, and proceedings had been dismissed (Pen.Code, § 1203 et seq., as amended and added by St.1935, p. 1706 et seq.).

4. Criminal law ⚷982

Statute relating to discharge of a probationer after fulfilling terms of his probation, and providing that verdict of guilty may be set aside, does not preclude the consideration of a prior conviction of a crime upon which the defendant has been placed on probation after probation has terminated and proceeding dismissed in determining whether a defendant is entitled to probation on a subsequent conviction (Pen.Code, § 1203 et seq., as amended and added by St.1935, p. 1706 et seq.; and § 1203.4, as added by St. 1935, p. 1709).

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Paul Leach was convicted of burglary in the second degree. From an order vacating an order granting probation and remanding the defendant to the custody of the sheriff for execution of sentence, the defendant appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was on May 26, 1937, convicted by a jury of the crime of burglary in the second degree. Judgment was pronounced by which defendant was sentenced to the state penitentiary at San Quentin, but the execution of the sentence was suspended by the entry of the following order: "Execution of sentence is suspended and defendant is placed on probation for a period of six years under the following conditions: Defendant must serve the first year of his probationary period in the County Jail. Road camp is recommended. Case is continued to June 2, 1937, at 9:30 a. m. for further disposition. Defendant is remanded." Thereafter the matter was continued until June 15, 1937, when the following order was made: "Order heretofore made granting probation is vacated and set aside for the reason that the defendant is ineligible for probation. Defendant is remanded to the custody of Sheriff for execution of sentence." Defendant was not charged in the information with the prior conviction of a felony, but upon passing on the application for probation the court had before it the record of the prior conviction of the defendant of the crime of burglary upon which he was placed on probation on September 6, 1933, for the term of three years. Probation was terminated in the prior case on November 26, 1936, and the proceeding was then dismissed.

[1-3] If the court was without authority to grant probation, the order of June 15 vacating the former order was proper. People v. Superior Court, 136 Cal.App. 541, 28 P.(2d) 1076; People v. Hainline, 219 Cal. 532, 28 P.(2d) 16, 17. It is now contended by defendant that the court's order placing him upon probation was proper for the reason that the prior conviction had not been pleaded in the information. The answer to this contention is disclosed by an examina-

tion of section 1203 of the Penal Code and the sections immediately following (as amended and added by St.1935, p. 1706 et seq.). It is there provided that upon conviction of a public offense the court may consider an application for probation and may summarily deny it or grant the application at a later time to be fixed; that the matter be heard and determined in the presence of the defendant; that the court must refer the matter to the probation officer "to investigate and to report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment; the probation officer must thereupon make an investigation of circumstances surrounding the crime and the prior record and history of the defendant and make a written report to the court of the facts found upon such investigation." The section further provides that the court may not grant probation to a defendant "who used or attempted to use a deadly weapon in connection with the perpetration of the crime of which he was convicted, nor to one who in the perpetration of the crime of which he was convicted inflicted great bodily injury or torture, nor to any defendant unless the court shall be satisfied that he has never in any place been previously convicted of a felony."

A convicted defendant is not entitled to be placed on probation as a matter of right but the power to grant probation may be exercised in the discretion of the court. "'Probation' is defined as an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted." People v. Hainline, supra. In providing the procedure under which probation might be granted, the Legislature has required an investigation and report by the probation officer. This of necessity involves the bringing before the court of matters which have not been formally pleaded. The Legislature clearly provided for the presentation to the court of matters outside the record in a criminal action. The language of the Code on the specific point now before us is significant. It is provided that probation shall not be granted unless the court shall be satisfied that the defendant has never previously been convicted of a felony. It is not specified that probation shall be denied to those formally charged with a previous conviction or to those proved to have been previously convicted, but rather it is required that the court be satisfied that the applicant's record be clear of conviction of felonies. Manifestly the Legislature did not require that formal pleading be made setting forth the former conviction. Since a convicted defendant has no right to demand probation, which is "an act of grace and clemency," the Legislature could properly provide for denial of probation to one concerning whom the court entertains doubt with regard to his previous felonious record.

[4] Defendant refers to section 1203.4 of the Penal Code (as added by St.1935, p. 1709), in which provision is made for the making of an order by the court, upon the discharge of a probationer after fulfilling the terms of his probation, by which the verdict of guilty be set aside. The section contains this provision: "provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." It is to be noted that it is not provided that the prior conviction *must* be pleaded. The permissive word *may* is used. Apparently it was the intention of the legislature to give the right to the prosecution to plead prior convictions upon the commission of later crimes notwithstanding the placing of defendants upon probation and their discharge therefrom. The provision was added by the amendment of 1927 (Pen. Code, § 1203, subd. 4, St.1927, p. 1496), and, as stated in People v. Hainline, supra, "If * * * any doubt existed in the minds of lawyers, judges, and laymen as to the status of those who committed a second felony, such doubt was removed by said amendment." The purpose of the amendment was to definitely fix the status of second offenders who had previously been placed on probation after the commission of crime. The amendment did not purport to modify or limit in any way the conditions or procedural steps leading up to the granting of probation, which remained in force as set out in section 1203.

The order is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

22 Cal.App.2d 537

HALL v. WOLFORD et al.

Civ. 1856.

District Court of Appeal, Fourth District, California.

Sept. 16, 1937.

1. Appeal and error ⚷800

A motion to dismiss appeal for delay in filing briefs will be denied, where appellants filed separate briefs before hearing on motion.

2. Appeal and error ⚷786, 1126

The District Court of Appeal will not grant motion to dismiss appeal or affirm judgment on grounds that appeal was taken for delay only and presents question so unsubstantial as to need no further argument, where decision of motion involves study of reporter's transcript (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

3. Appeal and error ⚷801(5), 1127

The District Court of Appeal will treat motion to dismiss appeal or affirm judgment on grounds that appeal was taken for delay only and presents question so unsubstantial as to need no further argument as demurrer to sufficiency of appellant's opening brief, and will consider such brief, moving papers, and necessary authorities in deciding motion, but need not examine entire record (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

4. Appeal and error ⚷786, 1126

Where appellant cites sufficient evidence in opening brief to show that question involved is debatable one, which should be decided only after careful study of reporter's entire transcript, respondent's motion to dismiss appeal or affirm judgment on grounds that appeal was taken for delay only and presents question so unsubstantial as to need no further argument must be denied (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by H. H. Hall against Harold Wolford and another. Judgment for plaintiff, and defendants appeal. On respondents' motions to dismiss the appeal, and to dismiss named defendant's appeal or affirm the judgment against him.

Motions denied.

J. Hampton Hoge, of San Francisco, and Chester O. Hansen, of Fresno, for appellant Harold Wolford.

Young, Hudson & Rabinowitz, of San Francisco, for appellant Dolson & Anderson, Inc.

Mills, Hunter & Dunn, of Los Angeles, and Ray W. Hays, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment for damages suffered by respondent while riding in an automobile owned and driven by Harold Wolford, an employee of Dolson & Anderson, Inc.

Respondent has made one motion for dismissal of the appeal because appellants' briefs were not filed in time and another to dismiss the appeal of Wolford or affirm the judgment against him because the appeal by him was taken for delay only and the question presented by him is so unsubstantial as not to need further argument. Section 3, rule V, Rules of the Supreme Court and District Courts of Appeal.

[1] Separate briefs were filed by appellants before the motions came on for hearing. This has been held to be sufficient answer to the first mentioned motion to dismiss. Toth v. Metropolitan Life Ins. Co., 113 Cal.App. 55, 297 P. 564; North v. Evans, 136 Cal.App. 434, 28 P.(2d) 938; Graybiel v. Consolidated Ass'ns, Ltd., 14 Cal.App.(2d) 547, 58 P.(2d) 665.

[2, 3] This court has repeatedly held that it would not dismiss an appeal on the grounds specified in the second mentioned motion or affirm the judgment where a decision of the motion would involve a study of the reporter's transcript. We treat such motion as a demurrer to the sufficiency of an appellant's opening brief and in deciding the motion consider the brief, the moving papers, and necessary authorities. We do not believe that on a decision of the motion the rule in question should require us to examine the entire record. Any other interpretation placed upon it would compel us to twice examine the record and twice consider the merits of the appeal in the event of the denial of the motion to dismiss or affirm. See Los Angeles v. Los Angeles-Inyo Farms Co., 126 Cal.App. 61

14 P.(2d) 339; Brown v. Gow, 126 Cal.App. 113, 14 P.(2d) 322; Thompson v. Boyer, 127 Cal.App. 149, 15 P.(2d) 541; Inga v. Blum, 132 Cal.App. 15, 22 P.(2d) 34; Lennon v. Woodbury, 1 Cal.App.(2d) 381, 36 P.(2d) 415; Barr v. Hall, 9 Cal.App. (2d) 426, 49 P.(2d) 1124; Rasmussen v. Fresno Traction Co., 11 Cal.App.(2d) 357, 53 P.(2d) 1038.

[4] The complaint in this action alleges that the negligence of Wolford in the operation of his automobile was a proximate cause of the accident and the injuries to respondent. Wolford, in his opening brief, urges that respondent was his guest at the time of the accident and not a passenger as urged by respondent. He cites sufficient evidence to show that the question is a debatable one that should only be decided after a careful study of the entire reporter's transcript.

Both motions are denied.

I concur: JENNINGS, Acting P. J.

22 Cal.App.2d 518

COVERLEY v. FRED L. WILKE CO. et al.

Civ. 11505.

District Court of Appeal, Second District, Division 2, California.

Sept. 8, 1937.

Hearing Denied by Supreme Court Nov. 1, 1937.

1. Bills and notes ⇨518(1), 520

In action against indorsers of a note, evidence *held* not to sustain defense that indorsement was without consideration and obtained by threats and extortion.

2. Trial ⇨396(3)

Where allegation of answer in an action against indorsers of note was merely evidentiary, a finding as to the allegation was not required.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by F. M. Coverley against the Fred L. Wilke Company and others, wherein defendants set up affirmative defenses. Judgment for plaintiff, and defendants appeal.

Affirmed.

Arthur Wm. Green and C. H. Scharnikow, both of Los Angeles, for appellants.

Mayock & Lester, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

[1] This is an appeal from a judgment in favor of the plaintiff in an action based upon an indorsement and guaranty of a promissory note. The answer of the defendants, while admitting the execution of the papers, set up as affirmative defenses that they were without consideration and that they were obtained by means of threats and extortion; that in order to compel the defendants to purchase certain shares of stock in the Fidelity Investors, Inc., from the plaintiff, Harvey M. Coverley, son of the plaintiff, as agent for the plaintiff, accused the defendants of allegedly unlawful acts and conduct in connection with the management and conduct of the affairs of the said corporation, of which the defendants had acted as officers; that he threatened them with exposure, arrest, and criminal prosecution unless they would agree to purchase this stock for $16.63 per share; that the stock was in fact valueless, but that these threats so worked upon the fears of the defendants that they were compelled to indorse and guarantee the note sued upon as part payment of the stock.

The first contention of the defendants is that the evidence does not justify the findings of the trial court that several of the allegations of the answer were untrue. The important issue before the trial court was this: Did the plaintiff or any one on her behalf make the threats or commit the menace charged? The defendants testified in the affirmative. The plaintiff's witnesses testified in the negative. The court believed the plaintiff's witnesses. There is substantial evidence to sustain the findings of the trial court.

The defendants next contend that the court erred in failing to find on the issue as to whether Harvey M. Coverley represented the plaintiff in all of the matters, transactions, and things alleged in the answer. The defendants made this allegation in order to bind the plaintiff with the acts of said Coverley, but the court found the said Coverley did not make the threats which were alleged, and, since the court found that the acts alleged did not take place, it became unnecessary to make a finding upon which the acts which did not occur could be imputed to the plaintiff.

[2] Finally, the defendants contend that the court erred in failing to make a finding on one of the paragraphs of the answer in which it was alleged that certain matters transpired in the probate court. These allegations were merely evidentiary, and there was no occasion to make a finding upon them.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

---

22 Cal.App.2d 536

URE v. MAGGIO BROS. CO., Inc., et al.

Civ. 2105.

District Court of Appeal, Fourth District, California.

Sept. 15, 1937.

Appeal and error 🔑786

Where appellants' opening brief alleged that trial court's findings were lacking in evidentiary support and that amount awarded plaintiff by way of general damages was excessive but failed to produce a conviction that questions involved were so unsubstantial as to demand immediate affirmance of judgment without consideration of record, motion to dismiss appeal was denied (Rules of the District Courts of Appeal, rule 5, subd. 3).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Margaret Grove Ure against the Maggio Bros. Company, Inc., and another. Judgment for plaintiff, and defendants appeal. On plaintiff's motion to dismiss the appeal or to affirm the judgment.

Motion denied.

Hugh B. Rotchford, of Los Angeles, and Loyal C. Kelly, of Riverside (Robert E. Ford, of Los Angeles, of counsel), for appellants.

Kenneth E. Schwinn, of Riverside, for respondent.

JENNINGS, Acting Presiding Justice.

This action was instituted by plaintiff, a woman 79 years of age, to recover damages for the alleged wrongful death of her adult daughter. Trial of the action resulted in the rendition of a judgment in plaintiff's favor in the amount of $10,881.23 of which the sum of $10,000 was awarded to plaintiff as general damages. Thereafter the defendants presented a motion for a new trial, which was denied, and defendants thereupon perfected an appeal from the judgment and the order denying their motion for a new trial. The opening brief of appellants was duly filed and respondent now moves this court to dismiss the appeal or affirm the judgment under the provisions of subdivision 3 of rule V of the rules of this court on the grounds that the appeal has been taken only for delay and that the question involved in the appeal is so unsubstantial as to require no further argument.

Examination of appellants' opening brief discloses that it is there contended that the trial court's findings are lacking in evidentiary support and that the amount awarded by way of general damages is excessive. Respondent's memorandum of points and authorities submitted in support of the motion for dismissal or affirmance contains numerous references to the transcript on appeal. Inspection of appellants' opening brief fails to produce a conviction that the questions involved in the appeal are so unsubstantial as to demand immediate affirmance of the judgment without consideration of the record. In accordance, therefore, with the settled policy of this court in a situation of this character, respondent's motion must be denied. City of Los Angeles v. Los Angeles-Inyo Farms, 126 Cal.App. 61, 14 P.(2d) 339; Brown v. Gow, 126 Cal.App. 113, 14 P.(2d) 322; Losleben v. California State Life Insurance Company, 128 Cal.App. 221, 17 P.(2d) 155; Nelson v. National Guaranty Life Co., 128 Cal.App. 341, 17 P.(2d) 155; Henry H. Cross Co. v. Prentice, 137 Cal.App. 497, 499, 30 P.(2d) 1017.

Respondent's motion to dismiss the appeal or to affirm the judgment is denied.

I concur: MARKS, J.

22 Cal.App.2d 548

E. CLEMENS HORST CO. v. FEDERAL MUT. LIABILITY INS. CO.

Civ. 10471.

District Court of Appeal, First District, Division 2, California.

Sept. 17, 1937.

Rehearing Denied Nov. 15, 1937.

1. Judgment 🔑217

An entry in minute book ordering that cause be dismissed is real judgment of dismissal, and subsequent formal judgment is mere memorial or record thereof, irrespective of judge's signature thereto (Code Civ. Proc. § 583, as amended by St.1933, p. 853).

2. Judgment 🔑326

Where court made minute order that cause should be dismissed for failure to bring it to trial within five years but thereafter signed formal judgment that action should be dismissed with prejudice, court could correct such formal judgment nunc pro tunc by eliminating phrase "with prejudice," since real judgment was as stated in minute order (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by the E. Clemens Horst Company against the Federal Mutual Liability Insurance Company. From a nunc pro tunc order correcting judgment of dismissal, defendant appeals.

Affirmed.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for appellant.

Brobeck, Phleger & Harrison and M. B. Plant, all of San Francisco, for respondent.

GRAY, Justice pro tem.

After an extended hearing of defendant's motion to dismiss the action, under section 583 of the Code of Civil Procedure, as amended by St.1933, p. 853, for failure to bring it to trial within five years after its commencement, the court, according to the entry in its minutes, ordered that the cause be dismissed. The next day, the court, upon its presentation by defendant, without notice to plaintiff, signed a formal judgment, which ordered that the action be dismissed "with prejudice." On the following day this judgment was entered and notice thereof given by defendant to plaintiff. Approximately ten months later, the court, upon plaintiff's application, ex parte, signed an order correcting, nunc pro tunc, the judgment by eliminating therefrom the phrase "with prejudice." From this last order, defendant appeals.

[1, 2] The parties agree that a court has plenary and inherent power, at any time, on its own motion or that of a party with or without notice, to correct clerical errors in the record of its judgment, so as to make such record conform to the judgment actually rendered, but it cannot, under the guise of exercising such power, correct judicial errors which it committed in the rendition of its judgment. Forrester v. Lawler, 14 Cal.App. 171, 111 P. 284. In applying these principles, the parties differ as to whether the minute order or the formal judgment constituted the judicial act which terminated the proceedings. In the cited case, upon which appellant mainly relies, it was held, without discussion or citation of authority, that, under similar facts, the formal judgment rather than the previous minute order was the judicial determination. However, this case has never been cited as to this particular holding which seems contrary to the generally accepted view. As was said in Colby v. Pierce, 17 Cal.App.(2d) 612, 614, 62 P.(2d) 778, 779, in holding invalid an ex parte vacation of a minute order of dismissal: "It is now the settled law in California that where an action is dismissed under the provisions of section 583 of the Code of Civil Procedure, as amended in 1933 (and the provisions of certain other sections of the same chapter of that Code) the order of dismissal is the judgment in the case and becomes effective for all purposes when entered upon the minutes of the court. Southern Pacific R. R. Co. v. Willett, 216 Cal. 387, 14 P.(2d) 526; Finch v. Ekstrom, 115 Cal.App. 381, 1 P.(2d) 516; King v. Superior Court, 12 Cal.App.(2d) 501, 56 P.(2d) 268; Long v. Superior Court, [14 Cal.App.(2d) 753] 58 P.(2d) 952; Colby v. Pierce, [15 Cal.App.(2d) 723], 59 P.(2d) 1046." The following excerpt from Darlington v. Butler, 3 Cal. App. 448, 452, 86 P. 194, 196, is in point: "The court pronounced its judgment of dismissal * * * on January 3d, when it so declared in open court and directed the clerk to enter the order. The order entered in the minute book was in effect the final judgment of dismissal. Marks v. Keenan, 140 Cal. 33, 73 P. 751; Pacific Paving Co.

v. Vizelich, 141 Cal. 4, 74 P. 352; Swortfiguer v. White, 141 Cal. 576, 75 P. 172. There is no statute requiring the judge to sign the judgment." See, also Nelson v. Geiss, 120 Cal.App. 247, 7 P.(2d) 720.

The minute order was the real judgment and the subsequent formal judgment was but a memorial or record thereof. The judge's signature to the latter did not change its nature nor give it additional efficacy. In re Cook, 77 Cal. 220, 17 P. 923, 19 P. 431, 1 L.R.A. 567, 11 Am.St.Rep. 267. Broder v. Conklin, 98 Cal. 360, 33 P. 211. The court was therefore authorized to correct its formal judgment, as a record, so as to make it conform with its judicial decision, as stated in the minute order. Dutton Dredge Company v. Goss, 77 Cal.App. 727, 247 P. 594.

The order appealed from is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

---

22 Cal.App.2d 568

CLOUD v. STATE TERMINAL CO., Limited.

Civ. 10328.

District Court of Appeal, First District, Division 2, California.

Sept. 21, 1937.

1. New trial 🔑3

Where parties agreed that only one issue would be submitted to jury and that if jury found for plaintiff on such issue accounting would be required to determine amount due plaintiff, and jury found for plaintiff, granting motion for new trial, before accounting was had or judgment of any kind was entered upon verdict, was premature and erroneous.

2. New trial 🔑3

All issues must be determined and judgment must be entered before trial court may entertain motion for new trial.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Lester Cloud against the State Terminal Company, Limited. From an order granting defendant's motion for new trial, plaintiff appeals.

Reversed.

William A. Lahanier, of San Francisco, for appellant.

Young, Hudson & Rabinowitz, of San Francisco, for respondent.

SPENCE, Acting Presiding Justice.

This is an appeal by plaintiff from the order of the trial court granting defendant's motion for a new trial.

The complaint in the action contained four counts for services rendered by plaintiff. The first was based upon an account stated; the second upon a book account; the third upon the reasonable value; and the fourth upon a written contract. The prayer of the complaint was for the sum of $5,203.19 "and for such other sum as the court after an accounting had shall determine is due and owing to plaintiff." In the answer, defendant pleaded among other things the abandonment of the written contract referred to in the fourth count of the complaint. A jury trial was demanded by plaintiff. When the cause came on for trial, it was agreed by the parties that the only issue that would be submitted to the jury was the issue of abandonment of the written contract, and if the jury found that there had been no abandonment, then an accounting would thereafter be required to determine the amount due. Said issue was submitted to the jury, which rendered a verdict to the effect that the contract had not been abandoned. No judgment of any kind was thereafter entered either upon said verdict or otherwise. Defendant filed its notice of intention to move for a new trial, and plaintiff filed a notice of motion for entry of an interlocutory decree. When said motions were heard, the trial court made its order granting the motion for a new trial and denying the motion for entry of an interlocutory decree. This appeal is taken solely from the order granting the new trial.

[1, 2] Appellant contends that the proceedings for a new trial were taken prematurely and that the trial court was without jurisdiction to entertain the motion for new trial prior to determination of all of the issues and the entry of judgment. In our opinion this contention must be sustained. Respondent has cited no authority which supports the action of the trial court

here, and we know of none. On the contrary, the authorities clearly indicate that all of the issues must be determined and judgment must be entered before the trial court may entertain such motion. Middleton v. Finney, 214 Cal. 523, 6 P.(2d) 938; Gunder v. Gunder, 208 Cal. 559, 282 P. 794; Root v. Daugherty, 201 Cal. 12, 255 P. 181; Barnes v. Foley, 189 Cal. 226, 207 P. 885; Estate of McKenna, 138 Cal. 439, 71 P. 501; Reclamation District v. Thisby, 131 Cal. 572, 63 P. 918; San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson, 30 Cal.App. 405, 158 P. 768; 20 Cal.Jur. 171, § 112.

The order granting a new trial is reversed.

We concur: STURTEVANT, J.; GRAY, Justice pro tem.

KEY NUMBER SYSTEM

GEORGE v. CITY OF LOS ANGELES et al.*

Civ. 11520.

District Court of Appeal, Second District, Division 2, California.

Sept. 15, 1937.

Hearing Granted by Supreme Court Nov. 8, 1937.

1. **Municipal corporations** 🔑767

Municipalities are liable for injuries caused by dangerous and defective conditions arising from improper construction of streets or allowed to exist after construction thereof (St.1923, p. 675, § 2).

2. **Municipal corporations** 🔑821(5)

Whether given set of facts or circumstances creates dangerous or defective condition of street, so as to render city liable for resulting injuries, is generally question for jury (St.1923, p. 675, § 2).

3. **Automobiles** 🔑301(1)

All allegations of complaint concerning elements entering into condition of street at place where automobile left street and struck electric light poles must be considered together in determining sufficiency of complaint as against demurrer by city in action for resulting damages (St.1923, p. 675, § 2).

4. **Automobiles** 🔑301(1)

The complaint, in action for damages suffered when plaintiff's automobile left street and struck electric light poles, *held* sufficient as against demurrer by city to show dangerous or defective condition of street (St.1923, p. 675, § 2).

5. **Negligence** 🔑121(5)

To fasten liability for injuries sued for on defendant, latter's conduct must be shown to have been proximate cause of injuries.

6. **Electricity** 🔑19(2)

The complaint, in action against city and electric company for injuries suffered when plaintiff's automobile left street and struck electric light poles beyond curb, *held* bad on electric company's demurrer as alleging that proximate cause of injuries was condition of street.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Walter George against the City of Los Angeles and the Los Angeles Gas & Electric Corporation. Judgment for defendants, and plaintiff appeals.

Reversed as to defendant city, and affirmed as to defendant gas and electric corporation.

Bradner & Weil, by Jerold E. Weil, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Leonard Husar and Bourke Jones, Deputy City Attys., all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff commenced this action to obtain compensation for damages alleged to have been suffered when his automobile was caused to leave a public street in the City of Los Angeles and to strike poles which had been erected by defendant Los Angeles Gas & Electric Corporation. Both the City of Los Angeles and the Los Angeles Gas & Electric Corporation were named parties defendant. Each defendant filed a demurrer, and both demurrers were sustained without leave to amend. From the resulting judgment plaintiff appeals.

From the allegations in plaintiff's complaint it appears that on April 11, 1936, plaintiff was driving his automobile in a northerly direction along Allesandro street in the City of Los Angeles in a careful and prudent manner. Rosebud avenue runs into Allesandro street from the east but does not cross Allesandro street. The space at the intersection is referred to, apparently for lack of a better expression, as the "triangular portion." Plaintiff further alleged that the street was in a dangerous and defective condition; that a dip or depression had been constructed in the street which was such as to cause automobiles proceeding northerly to be thrown from their intended course of travel and into and upon the curbing along the easterly side of said street; the dip or depression lay within the triangular portion of Allesandro street, and consisted of a downward pitch or grading toward the easterly curb and reaching its lowest point at a storm drain which extended approximately nine feet along the curb and two and one-half feet out into the traveled portion of the street; the cement-paved portion of the street had no appreciable slope or pitch toward the curb, but that within the triangular portion the street pitched curbward until the drop became such that, beginning at a point eight feet out in the street from the curb and opposite the storm drain, the street dropped downward toward the curb at such an angle that it was approximately eleven inches lower at the curb than at a point eight feet out from the curb; the street was sixty feet wide and perfectly straight for more than one thousand feet southerly of the place of the accident where the street narrowed from sixty feet to forty feet; the easterly curb line was perfectly straight for over one thousand feet south of the place of the accident, where the curb deviated and curbed in a direction westerly; the street was paved in cement lanes or strips southerly of the triangular portion referred to, but the two most easterly lanes terminated at the beginning of the triangular portion, and said triangular portion was paved with dark asphalt; two "telephone" poles stood within one foot of the curb at the scene of the accident; there was insufficient light at night to reasonably illuminate the locality; no warning signs of any kind were in place; the conditions were such as to create a hazard that persons traveling northerly on said street at night in either of the two cement lanes or strips nearest the right-hand curb would be led to believe that said street continued straight ahead, but that the light-colored cement lanes or strips would suddenly terminate, and the roadway would apparently "blank out," and by reason of the manner of paving, lack of warning signs, change in course of direction of curb line, and dip or depression, an automobile would be caused to strike said easterly curb, leave the traveled portion of said street, and strike one or both of said poles; that the dip or depression was so located and so graded as to create a hazard that, should an automobile enter into or upon the dip, the driver would be prevented from turning his automobile to the left to avoid colliding with the curb, but, on the contrary, the dip or depression would cause the automobile to swing to the right and strike the curb, leave the traveled portion of street and strike one or both of the poles; by reason of the said dangerous and defective condition and the negligence and failure of the officials of defendant city plaintiff's automobile was caused to leave the traveled portion of the street and crash against the poles of defendant company. Plaintiff further alleged the filing of a verified written claim with the officials of defendant city and the rejection of the claim; and that defendant city and its officers had knowledge and notice of the dangerous and defective condition of the street for several years prior to the day of the accident.

---

*For subsequent opinion see 79 P.2d 723.

[1] Plaintiff's cause of action is predicated upon the Public Liability Act of 1923 (Stats.1923, § 2, p. 675), which provides that municipalities "shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where." The liability created by this statute was unknown to the common law, but a number of decisions have been rendered since its adoption and it is now established that liability attaches for dangerous and defective conditions where they arise from improper construction of the street in the first instance or are rendered dangerous and defective by reason of conditions which are allowed to exist after construction. Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Bennett v. Kings County, 124 Cal.App. 147, 12 P.(2d) 47; Rodkey v. City of Escondido (Cal.App.) 60 P.(2d) 479; Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.(2d) 377; Wilkerson v. City of El Monte, 17 Cal.App.(2d) 615, 62 P.(2d) 790, 792. The statute refers to a "dangerous or defective condition," but there is no limitation or restriction as to the manner in which the

dangerous or defective condition may have been created. In Wilkerson v. City of El Monte, supra, the court said: "If, as constructed and maintained by the city, they created a defective or dangerous condition within the meaning of the Statutes of 1923 * * * there existed a liability of defendant city." In that case, as in the case of Uttley v. City of Santa Ana, supra, the accident involved a dangerous or defective condition resulting from the construction of depressions across a street.

[2-4] It has been repeatedly held that as a general rule it is a question for the jury to determine whether a given set of facts or circumstances creates a dangerous or defective condition. Norton v. City of Pomona, 5 Cal.(2d) 54, 53 P.(2d) 952; Barrett v. Southern Pac. Co., 207 Cal. 154, 277 P. 481; Gerberich v. Southern California Edison Co., 5 Cal.(2d) 46, 53 P.(2d) 948. As stated in Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.(2d) 643, no hard-and-fast rule can be laid down in cases of this kind, but each case must stand upon its own particular facts. All of the allegations of the complaint concerning the numerous elements entering into the condition of the highway at the place of the accident must be considered together. Without again setting them forth it is sufficient to say that if the allegations of the complaint should be established by evidence a verdict in favor of the plaintiff against the City of Los Angeles would not be without sufficient support. We may not hold as a matter of law that the allegations fail to show a dangerous or defective condition of the highway.

[5, 6] The ruling of the court in sustaining the demurrer of defendant Los Angeles Gas & Electric Corporation must be upheld. It is elementary that in order to fasten liability upon the defendant it must be shown that its conduct was a proximate cause of plaintiff's injuries. According to the allegations of the complaint the proximate cause was the condition of the street. The poles located beyond the curb may have enhanced plaintiff's injuries. They did not cause the injuries.

The judgment is reversed as to the defendant City of Los Angeles. The judgment is affirmed as to defendant Los Angeles Gas & Electric Corporation.

We concur: CRAIL, P. J.; McCOMB, J.

---

22 Cal.App.2d 520

BEAR FILM CO. v. INDEMNITY INS. CO. OF NORTH AMERICA.

Civ. 10482.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1937.

Rehearing Denied Oct. 15, 1937.

1. Insurance ⚷388(5)

Under liability policy which excluded employees whose regular duties involved use of an automobile from coverage but required insurer to defend suits in which assured was alleged to be liable, insurer, which employed counsel to defend assured in action against assured as principal and subsequently offered to negotiate settlement, although it denied liability on ground employee was in excluded class of policy and reserved rights thereunder, was not estopped to deny its liability under the policy on ground that motorist was an "independent contractor" (Code Civ.Proc. § 1962, subd. 3).

2. Insurance ⚷435

Under policy which limited liability of insurance carrier to that imposed by law upon assured and which contained negative expressions showing it did not cover acts of independent contractors, insurer was not liable to assured for amount paid by assured in settlement of claim against an independent contractor.

◆

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by the Bear Film Company against the Indemnity Insurance Company of North America. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

Robert E. Hatch, of San Francisco, for appellant.

Charles V. Barfield, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff brought an action to recover on an insurance policy. After the plaintiff had introduced its evidence, the trial court granted a motion for a nonsuit. From the judgment entered the plaintiff has appealed.

On the 28th day of May, 1933, the automobile being driven by M. D. Worth and two other automobiles collided on the highway between Watsonville and Santa Cruz in Santa Cruz county. Three different occupants of one of the other automobiles were injured. Three different actions were commenced to recover damages. In each action the plaintiff named as defendants M. D. Worth, this plaintiff, as his principal, and several fictitious names as defendants. The three actions were afterwards set down for trial in the superior court at Santa Cruz, and one of said actions was almost completely tried when an agreement to settle was made. On October 16, 1934, the settlement was completed, and as we understand the record the three actions were dismissed. At the time of the settlement Mr. Albert A. Hanson, president of the plaintiff corporation, was present, was advised by Mr. Stanford Smith, the attorney appearing for the plaintiff, and, being advised as to the facts, drew his check in the sum of $1,500 in payment of the amount allotted against this plaintiff for the damages claimed in the three different actions. Thereafter, on the 4th day of June, 1936, the plaintiff commenced this action against the defendant as its insurance carrier to recover $1,500 and interest thereon, being the amount it had paid in the above-mentioned settlement. In the last-named action the insurance company answered and a trial was had before the trial court sitting with a jury. The plaintiff called one witness, Mr. A. A. Hansen. That witness was examined and cross-examined. From the testimony so given by the witness it appeared without contradiction that at the time of the accident M. D. Worth was an independent contractor. The motion for a nonsuit was based on the ground that the plaintiff had failed to offer any evidence showing or tending to show that this was a loss covered or contemplated by the terms or provisions of the policy of insurance issued by defendant to the plaintiff. In granting the motion the learned judge of the trial court stated: "In my judgment the plaintiff herein has failed to prove a sufficient case for the jury. Plaintiff's evidence shows that at the time of the accident in question, M. D. Worth, the driver of the automobile, was guilty of negligence and was liable for damages; therefore the only inference to be drawn from the evidence in this case was that Worth was an independent operator and that no legal liability was imposed by law upon the Bear Film Company, the plaintiff in this action, and that the case is not covered by the policy in evidence because Worth, as I have stated, was an independent contractor, as the evidence in this case shows and was not the agent or servant of the plaintiff at the time of the accident. Hence the defendant in this case is not liable under the policy in question." That M. D. Worth, at the time of the accident, was an independent contractor, as held by the trial court, was under the facts clearly correct. Barton v. Studebaker Corp. of America, 46 Cal.App. 707, 189 P. 1025; Counihan v. Lufstufka Bros. & Co., 118 Cal.App. 602, 5 P.(2d) 694. As we understand the plaintiff it does not controvert that legal proposition but earnestly contends the defendant is estopped in this action to make that defense.

[1] An understanding of the estoppel theory requires a consideration of additional facts. When the summonses in the Santa Cruz cases were served on the plaintiff, it immediately notified the defendant. The latter directed that the papers be sent to its office. That step was taken and the papers were put in the hands of Mr. Charles V. Barfield, the defendant's attorney. He prepared answers and sent them to Mr. Stanford Smith, an attorney at law practicing at Santa Cruz. Mr. Smith was directed by Mr. Barfield to take charge of the litigation and present the defense of the Bear Film Company. At the same time the defendant caused its investigators to examine into the facts. On July 24, 1933, it mailed to the plaintiff a letter in which it stated that the policy in suit did not cover said actions because "Mr. Worth's regular duties involved the use of an automobile and this class of employees is excluded from the coverage as provided by our policy." However, in the same letter the defendant stated it would be pleased to negotiate a settlement in behalf of this plaintiff, but in making such offer it did not alter the rights of either party as expressed in the insurance policy. Mr. Smith took charge of the litigation in Santa Cruz, and as stated by Mr. Hansen on the last day of the trial, the defendants in the Santa Cruz actions obtained information that a settlement could be made. Mr. Hansen and Mr. Smith conferred. Testifying in the instant case, Mr. Hansen stated they had tried to present as a defense the claim that M. D. Worth was an independent contractor and that in the conversation just mentioned between him and Mr. Smith the latter stated he was afraid the jury would find against them on that defense and therefore he advised Mr. Hansen to accept the offer of the plaintiffs in those cases and

settle them. Thereupon Mr. Hansen drew his check in the sum of $1,500 in favor of Wyckoff, Gardiner & Parker, attorneys for the plaintiffs in the Santa Cruz actions. In this connection it should be noted that under date of October 13, 1934, Mr. Barfield wrote the plaintiff, stating that a settlement could be made, that Mr. J. Hampton Hoge, the attorney for some of the other defendants, was favorable to a settlement, and that Mr. Barfield, would assist in negotiating a settlement. However, he closed the letter with a statement that the defendant reserved all of its rights under the policy. A copy of that letter was immediately sent to Mr. Harold Levin, this plaintiff's attorney.

In taking charge of the litigation, in employing Mr. Smith, and in all other respects regarding the handling of the cases in Santa Cruz, whether the defendant was liable for damages to the plaintiffs in said actions it was bound to take the steps and do the things it did under the clear terms of its policy. Among other things that document provides: "And the Company also agrees as respects sections A, B, and E when covered to defend, in the name and on behalf of the Assured, all claims or suits for such injuries for which the Assured is, or is alleged to be, liable; to pay all costs and expenses incurred with the Company's written consent; to pay all court costs taxed against the Assured in any such suit, including the premiums on attachment and/or appeal bonds required in any such proceedings; to pay all interest accruing upon that part of any judgment which is within the limits of the Company's liability in any such suit, up to the date of the payment or tender to the judgment creditor, or his attorney of record, of the amount for which the Company is liable." Giving due consideration to each and all of the foregoing facts, we think it is clear that no estoppel arose against the defendant. Code Civ. Proc. § 1962, subd. 3; 10 Cal.Jur., "Estoppel," § 14.

[2] As noted above, in defendant's letter dated July 24, 1933, it stated in effect that the defendant was not liable for injuries caused by Mr. Worth whose regular duties involved the use of an automobile and that such class of employees was excluded from the coverage as provided in the policy. The defendant makes the same contention at this time. The point arises by reason of certain exclusion clauses. The plaintiff contends the construction of such clauses by the defendant is not warranted by the authorities. In that connection it contends the language of the policy is broad and the exclusion clause did not exclude Worth as an employee and in any event did not exclude him as an agent. We need not pause to solve that problem. The plaintiff concedes that the liability assumed by the defendant was "* * * by reason of the liability imposed by law upon assured arising out of such bodily injuries or death so resulting." It does not claim that any liability would have been imposed on it for the negligence of an independent contractor. The policy contains no express provision covering such persons but, on the other hand, it contains certain negative expressions showing it did not cover the acts of independent contractors.

The judgment appealed from is affirmed.

We concur: SPENCE, Acting P. J.; GRAY, Justice pro tem.

9 Cal.2d 567

PEOPLE v. WILHELM.

L. A. 4109.

Supreme Court of California.

Sept. 20, 1937.

1. Homicide ⟹147

Premeditation may be inferred from proof of such facts and circumstances as would reasonably warrant an inference of its existence.

2. Homicide ⟹253(3)

In prosecution for murder in the first degree, evidence of premeditation *held* to justify conviction for first-degree murder and imposition of the death penalty.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Frank Wilhelm was convicted of murder in the first degree, and he appeals.

Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

PER CURIAM.

This is an automatic appeal under Penal Code, § 1239 (as amended by St.1935, p.

1868), after conviction upon the charge of murder in the first degree, and the imposition of the death penalty. Defendant was also charged in a second count with having committed a robbery upon the same victim on the same date. This count was later dismissed.

After the entry of the plea of guilty, the trial court took evidence to determine the degree of the crime, and, among other things, the transcript of the preliminary examination of defendant was received in evidence by stipulation, to be used by the court in arriving at its decision.

The only contention of defendant upon this appeal is that the court was not justified in holding the crime to be murder in the first degree, with the death penalty pronounced thereon.

It appeared that the deceased, Jesus A. Tomaya, a Filipino, employed as a servant in a private home, met his death on November 23, 1936, in an apartment house located at 240 South Figueroa street, in the city of Los Angeles. On this day deceased left his place of employment at about 11:30 a. m., it being his day off. He was wearing a diamond ring and also had on his person a watch and chain and another ring. His employer testified that she gave him a $5 bill before he left. He proceeded to the apartment house above mentioned, whereat defendant was living with two other Filipinos named Emilio Ramos and Francisco de la Cruz, respectively. Defendant was a half-breed Filipino. The apartment was located on the ground floor of the building and consisted of a living room with a folding bed and a couch, a bathroom, and kitchen. When deceased arrived at the apartment defendant and de la Cruz were still in bed. Defendant thereupon admitted deceased to the apartment and began dressing himself. Ramos, the other roommate of defendant, had left very early in the morning to go to his work and consequently was not present when deceased arrived. De la Cruz awakened about 11:30 or thereabouts and found Tomaya and defendant engaged in a friendly conversation. De la Cruz had not met Tomaya before, and soon after awakening, he dressed and left the apartment. He testified that he heard Tomaya talking about either his diamond ring or another ring he had on as costing some $85, and that during the conversation between Tomaya and defendant they were smiling and very friendly toward one another; that when he left they were talking about going to a show. It appeared that about 3 p. m., on the same day, defendant came out of the apartment and stated to the manager: "If anyone calls me, tell them I don't live here any more." After leaving the apartment house defendant pawned a diamond ring and received $10 for it. Ramos returned to the apartment about 8 o'clock p. m., on the evening of the same day, and upon entering he was attracted by the sight of blood in the middle of the living room floor. He then noticed defendant's suitcase was missing from the closet and thereupon discovered the body of deceased on the floor of the closet. The hands and feet were tied and there was a string around his head. The body was covered with towels full of blood, and the head was considerably swollen. The cords used to tie the hands and feet came from the bathrobes belonging to defendant and Ramos, respectively. A rolling pin wrapped in a bloody towel was found in a cupboard drawer in the kitchen. No money or jewelry was found on the body of the deceased.

About a week later defendant was apprehended in San Francisco, where he had gone the day of the death of deceased, and where he pawned some of the other jewelry taken from the body of deceased. He stated to police officers that on the occasion of Tomaya's visit deceased had become angry when defendant had refused to agree to get some girls for them, for immoral purposes, and that he (deceased) struck at defendant with a hair brush; that defendant struck deceased with his hands a couple of times and that deceased got up and struck at him again, putting his hand in his pocket; that defendant thought the deceased was going to go for a knife or a gun, and he struck him again and knocked him unconscious; that thereupon he became worried for fear the deceased or some of his gang might "get him" when the deceased recovered his consciousness, so he (defendant) crawled to the kitchen and took a rolling pin which was on a chair and hit deceased over the head. He stated that he did not know deceased was dead; that he was still breathing when he leaned over him; that he took the watch, two rings, and a cigarette case, but no money; that he admitted pawning the diamond ring and the watch. He stated that he lost the other ring and gave the cigarette case to somebody because it had deceased's initials on it and he "knew it was hot"; that he took these articles because he had no money to get away from Los Angeles. At the hearing to determine the degree of the crime, a police officer testified that he had made an investigation of the crime and had had a conversation with the defendant; that the latter told him deceased was not armed at the time of the fight; he also testified that deceased had the smell of wine on his breath when he came to the apartment, but that he was not intoxicated; that deceased brought a pint of wine with him and that they had a couple of drinks in the kitchen. Defendant stated that he had no idea of stealing anything from deceased prior to the time he hit him with the rolling pin. Deceased's face was considerably swollen and he suffered the following injuries; contusions and lacerations on his head and face; a fracture of the lower jaw bone; two hemorrhages on his head inside the scalp, one on either side; a large subdural hemorrhage over the brain; and two skull fractures.

[1, 2] Defendant contends malice was not shown, in that as there were no eyewitnesses and only the word of the defendant as to what took place, that such evidence negatives either express or implied malice. He contends that under the evidence it was incumbent upon the trial judge to have found the degree of the crime to have been manslaughter where, as here, the killing, though unlawful, is "without malice." In view of the facts in this case shown by the testimony reviewed hereinabove, which showed the deceased's trussed-up body in the closet, the presence of blood in various places in the apartment, the rolling pin in the bloody towel, the undisturbed condition of the furniture and furnishings in the room, the nature of the blows which must have fallen upon deceased's head to produce the swollen condition, hemorrhages, and fractures testified to, together with the further fact that nobody in the apartment house heard any noise emanating from the apartment of defendant during the time it was shown he and deceased were there together, which might have suggested a fight, although someone was at the desk in the apartment house all day, on the same floor, three doors down the hall, it cannot be said that premeditation was not shown when these circumstances are considered together with defendant's statement that he had hit deceased with the rolling pin after the deceased was unconscious. It is said in the case of People v. Erno, 195 Cal. 272, 232 P. 710, that premeditation may be inferred from proof of such facts and circumstances in the case as would reasonably warrant an inference of its existence. Such facts are apparent in this case.

Defendant claims that the evidence was not sufficient to justify the trial judge in inferring that the facts above related tended to negative the existence of a fight in the room, but the inferences drawn by the trial judge therefrom were not only based on sufficient evidence but were reasonable and fair in view of all the facts and circumstances above related.

No error being shown in the record, the judgment must be and hereby is affirmed.

---

9 Cal.2d 561

PAUL v. LAYNE & BOWLER CORPORATION.

L. A. 16268.

Supreme Court of California.

Sept. 20, 1937.

1. Trial 🔑109

A plaintiff was not entitled as a matter of right to have judgment of nonsuit set aside merely because judgment was granted on opening statement of plaintiff's counsel, since such judgment will be affirmed if from all facts alleged in complaint and stated by counsel and all favorable inferences to be deduced therefrom it is apparent that a case cannot be maintained by plaintiff.

2. Frauds, statute of 🔑126

An oral agreement to make a contract which must be in writing is itself within statute of frauds (Civ.Code, § 1624, subd. 4; Code Civ.Proc. § 1971).

3. Frauds, statute of 🔑129(12)

Plaintiff, who went into possession of farm and farmed portion thereof, could not recover damages for defendant's failure to perform alleged oral agreement to execute three-year lease, on ground of part perform-

ance, where performance relied on was not under contemplated lease, since part performance must relate to transaction involved (Civ.Code, § 1624, subd. 4; Code Civ.Proc. §§ 1971, 1972).

4. Frauds, statute of ⚷144

Plaintiff, who went into possession of farm and farmed portion thereof, could not recover damages for defendant's failure to perform alleged oral agreement to execute three-year lease under doctrine of estoppel, on theory that plaintiff had performed and that performance was consideration for agreement, since the most plaintiff was entitled to was a return of benefits received by defendant by reason of plaintiff's occupancy.

5. Contracts ⚷138(2)

No right of action for damages exists for breach of invalid or unenforceable contract, even though plaintiff has partly or wholly performed.

6. Trial ⚷109

In action to recover amounts for which plaintiff, who had gone into possession of farm, had become liable on account of defendant who failed to perform alleged oral agreement to execute three-year lease, where defendant filed cross-complaint for money advanced to plaintiff, and plaintiff's counsel did not purport to set forth in opening statement all that he expected to prove, parties were entitled to proceed to trial, and it was error to grant motion for nonsuit on opening statement.

7. Appeal and error ⚷110

An order denying a motion for new trial is not appealable.

In Bank.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by O. S. Paul against the Layne & Bowler Corporation, wherein defendant filed a cross-complaint. From a judgment of nonsuit, plaintiff appeals.

Judgment affirmed in part and reversed in part.

Prior opinion, 64 P.(2d) 488.

Earl F. Crandell, of Los Angeles, C. E. Crowley, of Ontario, Cal., and Edgar T. Fee, of Los Angeles, for appellant.

Robert L. Williams, of Los Angeles, and Sarau & Thompson, of Riverside, for respondent.

SHENK, Justice.

This appeal is from a judgment of nonsuit on the opening statement of the plaintiff's counsel.

The plaintiff filed an action against Layne & Bowler Corporation for damages alleged to have been suffered by reason of the defendant's refusal to perform an alleged oral agreement to execute a lease of certain farming property for a period of three years from the fall of 1933 with an option to renew for an additional period of two years. The complaint contained two causes of action. The plaintiff alleged that he took possession of the property in the spring of 1933, farmed 200 acres thereof and harvested a crop of oats and barley; that he also constructed an irrigation ditch and additional buildings in contemplation of and in the belief that the defendant would execute the lease. It is also alleged that the defendant on August 14, 1933, ordered the plaintiff to vacate the premises. Under the first cause of action the plaintiff sought recovery of damages in the sum of $40,000, representing benefits and profits of which he has been deprived by the refusal of the defendant to execute the lease. By the second cause of action he sought to recover the amounts for which he had become liable on the defendant's account, and alleged to be $8,000.

The defendant's demurrer to the complaint was overruled. The defendant thereupon filed an answer traversing the material allegations of the complaint and pleading the statute of frauds as to both causes of action relying on section 1624, subdivision 4, Civil Code; section 1971, Code of Civil Procedure. It also filed a cross-complaint seeking judgment on the plaintiff's note to it for $50, and for the sum of $470.75 additional advanced to the plaintiff to defray necessary current expenses incurred in growing, maturing, and harvesting the 1933 crops. The plaintiff filed an answer to the cross-complaint tendering issues thereon and alleging an accounting of the sums stated to have been advanced by the defendant and of further sums expended or incurred by him, which accounting shows a balance of expenditures or liabilities over receipts of the sum of $125.25. The pleadings of both parties appear to admit that the plaintiff was in possession of the property and farmed and harvested the 1933 crops under a former but abandoned or terminated lease theretofore entered into by the defendant with one Botsford, by whom the plaintiff had been employed.

At the time the case was called for trial counsel for the plaintiff made an opening statement in which he stressed the fact that the plaintiff did not ask for specific performance, but sought damages for the failure of the defendant to perform the alleged oral agreement to make a lease. On motion of the defendant the court nonsuited the plaintiff as to both causes of action on the opening statement of his counsel and dismissed the defendant's cross-complaint without prejudice.

[1] The plaintiff is not entitled as a matter of right to have the judgment of nonsuit set aside, merely because the same was granted on the opening statement of his counsel. Nicholl v. Littlefield, 60 Cal. 238; Green v. Duvergey, 146 Cal. 379, 388, 80 P. 234. Such judgment will be affirmed if from all the facts alleged in the complaint and stated by counsel and all the favorable inferences to be deduced therefrom it is plainly apparent that a case cannot be maintained by the plaintiff. Emmerson v. Weeks, 58 Cal. 382; Bias v. Reed, 169 Cal. 33, 38, 145 P. 516.

[2] It is necessarily conceded that an oral agreement to make a contract which must be in writing is itself within the statute of frauds. Section 1624, Civ.Code; section 1971, Code Civ.Proc.; Fuller v. Reed, 38 Cal. 99; Little v. Union Oil Co., 73 Cal.App. 612, 621, 238 P. 1066.

[3] Section 1972 of the Code of Civil Procedure provides that the statute shall not be construed to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof. The plaintiff, in part relies upon authorities holding that part performance "takes the contract out of the statute." McCarger v. Rood, 47 Cal. 138, 141; Forrester v. Flores, 64 Cal. 24, 26, 28 P. 107. To entitle the plaintiff to the relief provided for by section 1972, the part performance must relate to the transaction involved, viz. the transfer of the interest in land which is the subject of the agreement. McCarger v. Rood, supra; Clark v. Clark, 49 Cal. 586; Davis v. Judson, 159 Cal. 121, 131, 113 P. 147. The plaintiff did not have possession under the lease alleged. It is apparent from the facts disclosed in the pleadings and the statement by counsel that the performance relied on was not under the contemplated lease which was not to come into being or operation until the fall of 1933. Since there was no such lease in existence and no part performance of any lease orally agreed, the plaintiff was not entitled to relief under his first cause of action or the statement by his counsel in connection therewith. Bartlett v. Aitken, 48 Cal. 405; Vasik v. Speese, 26 Cal.App. 129, 146 P. 61; Hurley v. Woodsides (Ky.) 54 S.W. 8.

This is not a case of the defendant's preventing the lease from being put into writing and by fraudulent means leading the plaintiff to believe that it was in writing and to act upon such belief to his prejudice. Section 1623, Civ.Code.

[4] Nor may the plaintiff place reliance upon the equitable doctrine of estoppel recognized in Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154, and similar cases (see Long v. Long, 162 Cal. 427, 122 P. 1077; Little v. Union Oil Co., 73 Cal.App. 612, 620, 238 P. 1066), to support his contention that he is entitled to damages for the breach of the oral agreement to execute the lease, which, so he claims, was fully performed by him. It is apparently the plaintiff's theory that the performance alleged is the consideration for the promise to make the lease, and that, having performed on his part, he is entitled to damages for the failure of the defendant to perform. But the passing of the consideration as performance on his part of the oral contract is not alone sufficient to entitle him to any relief for the breach thereof. His remedy is in a cause of action for the return of the benefits received by the defendant. Forrester v. Flores, 64 Cal. 24, 28 P. 107; Davis v. Judson, 159 Cal. 121, 113 P. 147; Matheron v. Ramina Corp., 49 Cal.App. 690, 694, 194 P. 86; Dondero v. Aparicio, 63 Cal.App. 373, 218 P. 608. The facts alleged and stated show that the plaintiff could not present a case of fraud or unconscionable injury to support an estoppel under any statute or authority relied upon by him.

[5] The intimation in the case of Martinez v. Yancy, 40 Cal.App. 503, 180 P. 945, relied on by the plaintiff, that there

may be a remedy by an action for damages for the breach of an oral promise to make a lease for a longer period than one year, is inconsistent with the generally accepted doctrine that no right of action for damages exists for the breach of an invalid or unenforceable contract (Kiser v. Richardson, 91 Kan. 812, 139 P. 373, and cases cited in note, Ann.Cas.1915D, p. 540 et seq.), even though the plaintiff has partly or wholly performed on his part (White v. McKnight, 146 S.C. 59, 143 S.E. 552, and cases cited in note, 59 A.L.R. 1305, et seq.), and should be disregarded.

[6] Under any view of the case, the most to which the plaintiff would be entitled is the amount he had expended for the defendant's account for which he has not been reimbursed and a return of or compensation for the benefits which the defendant has received under the plaintiff's occupancy by which the defendant has become unjustly enriched and for which it is therefore indebted to the plaintiff. Fuller v. Reed, supra; Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84; Dondero v. Aparicio, supra, 63 Cal.App. 373, 378, 218 P. 608. These matters, while not in form based on the common counts, were nevertheless substantially set out in the plaintiff's second cause of action and were traversed with counter charges in the defendant's answer and cross-complaint to an extent sufficient to permit the parties to proceed to trial on those issues. The reporter's transcript discloses all that took place upon the commencement of the trial. From a consideration thereof it may fairly be said that plaintiff's counsel did not purport to set forth all that he expected to prove. Nothing was said as to the evidence to be introduced in support of the allegations of the second cause of action. Under those circumstances, it was error to grant the motion as to that cause of action.

[7] The order denying the plaintiff's motion for a new trial is nonappealable. The appeal therefrom is therefore dismissed.

The judgment is affirmed as to the first cause of action, and is reversed as to the second cause of action, neither party to recover costs on appeal.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.; LANGDON, J.

---

22 Cal.App.2d 559

BECKJORD v. SLUSHER et al.

Civ. 11495.

District Court of Appeal, Second District, Division 2, California.

Sept. 20, 1937.

1. Landlord and tenant ⚷22(3)

Where landlord who had agreed to lease premises to prospective tenants and to discharge them from liability if they produced an assignee satisfactory to landlord entered into an oral agreement with prospective tenants whereby others were substituted as tenants, and then entered into a lease with substituted tenants, the prospective tenants were relieved from all liability under the first agreement, since they had supplied parties satisfactory to the landlord.

2. Frauds, statute of ⚷44(1)

Oral agreement between landlord and prospective tenants by which written agreement between them was modified, new tenants were substituted, and prospective tenants guaranteed that market located on leased premises would be kept open and operating for ten years, was invalid because it was not to be performed within a year and was not in writing subscribed by party to be charged or his agents under statute (Civ.Code, § 1624, subsec. 1).

3. Frauds, statute of ⚷38

Prospective tenants who had allegedly induced landlord to enter into lease with others by their false representations as to credit of one of substituted tenants would not be liable to landlord in fraud or deceit where representations were not in writing, and subscribed by party to be charged under statute (Code Civ.Proc. § 1974).

4. Torts ⚷26(1)

In landlord's action against prospective tenants to whom landlord had agreed to lease premises and who had allegedly induced landlord to accept others as tenants by false representations as to credit of one of the substitute tenants, complaint alleging only that proposed tenants failed to abide by a purported agreement between them and the substitute tenants, to which agreement the landlord was not a party, was insufficient to show interference by proposed tenants with performance of lease by the substitute tenants.

5. Appeal and error ⇐102

An appeal from an order sustaining a demurrer to the complaint and not from judgment entered on the order would not lie.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by J. G. Beckjord against Silas F. Slusher and another. From a judgment dismissing the action, the plaintiff appeals, attempting to appeal also from an order sustaining a demurrer without leave to amend as to one of the causes of action in the complaint as amended.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellant.

George M. Breslin and Henry G. Bodkin, both of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal by plaintiff from a judgment dismissing the action after the trial court, on the ground that no cause of action was stated, sustained an objection to the introduction of any evidence as to the first and second alleged causes of action in the amended complaint. There is also an attempt to review the trial court's ruling in sustaining a demurrer without leave to amend as to the third alleged cause of action in the complaint as amended.

The material facts set forth in the first and second counts, which are substantially identical, are as follows:

Count I.

(1) On May 20, 1931, plaintiff and defendants entered into a written agreement reading as follows:

"This agreement made and entered into this 20th day of May, 1931, by and between J. G. Beckjord, party of the first part and Silas F. Slusher and Margaret F. Slusher, parties of the second part.

"Witnesseth:

"That Whereas on or about June 20th, 1927, first party executed and delivered to Jake's Place, Inc., a lease for a period of ten years commencing September 1st, 1927 and ending September 30th, 1937, covering the property known as 3627 Beverly Boulevard, Los Angeles, California, and there is now delinquent under said lease the sum of $550.00 rent for the month of April, 1931, due and payable April 1, 1931; $550.00 rent for the month of May, 1931, due and payable May 1, 1931, and second installment of 1930 real estate taxes against said premises in the sum of $544.62, plus penalties and interest as provided by law, and

"Whereas, first party is desirous of terminating said lease and getting possession of said premises and entering into a new lease with second parties,

"Now Therefore, in consideration of the sum of $1672.17 paid by second parties to first party, the receipt of which is hereby acknowledged, first party promises and agrees to dismiss at once two actions now pending in the Municipal Court for the collection of such rent and taxes, and immediately serve on Jake's Place, Inc., and subtenants, a notice to quit said premises for default in the payment of such rent and taxes in accordance with the statutes in such case made and provided; that in the event said Jake's Place, Inc., and sub-tenants fail to vacate said premises within three days after the service of said notice to quit, first party will commence at once an action in unlawful detainer to obtain possession of said premises, plus triple damages, and will prosecute said action diligently, to final judgment; that upon securing such final judgment first party will have execution issued as soon as authorized, and in the event of securing a money judgment will levy upon the fixtures upon said premises belonging to Jake's Place, Inc., and proceed to sell the same at once and bid thereon in order to purchase the same, up to the amount of first party's judgment, or such additional amount as the parties of the second part shall instruct the party of the first part and reimburse him for; that in the event first party bids in such fixtures on such sale, he will immediately quitclaim the same to second parties without cost; that as soon as first party obtains possession of said premises whether by such unlawful detainer action, notice to quit, or otherwise, he will deliver possession to second parties, and as soon as such possession is delivered the parties hereto will enter into a lease in substantially the same form as executed heretofore between first party and Jake's Place, Inc., providing however, for a term of ten years commencing the 1st day of June, 1931 and ending on the 31st day of May, 1941, at a total rental of $87,000.00, payable at Security-First National Bank of Los Angeles, California, First National office, 7th & Spring Streets, Los Angeles, California, in installments each due and payable in advance on the 1st day of each and every calendar month at the following rate: $500.00 per month for the first year; $550.00 per month for the second year; $650.00 per month for the third year; $750.00 per month during the fourth, fifth, sixth, seventh and eighth years; $900.00 per month during the ninth and tenth years, with an option to renew said lease for an additional period of five years at the rate of $900.00 per month. In addition to such rentals, taxes against said premises are to be paid by said second parties, said lease to contain a provision that *the same may be assigned by the parties of the second part, provided they produce to the first party a satisfactory assignee thereof, and upon such assignment, approved and consented to by the party of the first part, parties of the second part are to be relieved from all other and further liability to the party of the first part under said lease;* said lease to further contain a provision that portions of said premises may be sublet by the parties of the second part or their assignees without the consent of the party of the first part.

"If, in the event said Jake's Place, Inc., or anyone on its behalf, should pay up all delinquencies and thereby rehabilitate said original lease so as to prevent the parties hereto from consummating this transaction, then this agreement to be null and void, and the sum of $1672.17 shall be returned to the parties of the second part by the party of the first part.

"The party of the first part hereby agrees at the request of the parties of the second part to institute and prosecute any bankruptcy proceedings against said Jake's Place, Inc., as the parties of the second part shall desire, all expenses in connection therewith however, to be paid by the parties of the second part.

"Said party of the first part hereby agrees to assume and pay all expense in connection with such unlawful detainer proceedings and sell all said fixtures as aforesaid.

"Second parties promise to pay rent and taxes in accordance with such proposed lease commencing with June 1, 1931, provided, however, that in the event first party is unable eventually to deliver possession in accordance with the proceedings contemplated hereunder, and Jake's Place, Inc., or someone in their behalf pay rental and taxes under its lease for June 1, 1931 and subsequently so as to rehabilitate their lease, then such payments made by said second parties shall be refunded.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"J. G. Beckjord
"First Party
"Silas F. Slusher
"Margaret F. Slusher
"Second Parties." (Italics ours.)

(2) In June, 1931, a new oral contract was entered into between plaintiff and defendant by which they agreed as follows:

Ben H. Chamberlain and Chauncey W. Chamberlain were to be substituted in lieu of defendants in the lease proposed in Exhibit B; when execution issued in said unlawful detainer action and the fixtures, furnishings, and equipment in said market sold pursuant thereto, Chauncey W. Chamberlain should bid the same in and should thereupon rearrange and improve the fixtures, furnishings, and equipment therein and should reopen said market at the earliest possible opportunity; defendants should lend said Chamberlains, without security, the sum of $10,000 to rearrange, alter, and improve said fixtures, furnishings, and equipment and put said market in what defendants considered proper shape for operation, and defendants should sell and transfer to said Chamberlains all of such fixtures, furnishings, and equipment so rearranged, altered, and improved, without security, and thereafter lend said Chamberlains such additional sums as would enable them to reopen and operate said market; plaintiff should have a chattel mortgage on all such fixtures, furnishings, and equipment as security for the performance of all obligations by said Chamberlains under the proposed lease to be executed by and between plaintiff and said Chamberlains. Defendants further promised plaintiff that they would insure, and had insured, said Chamberlains against all loss if they would enter into said transaction; that defendants would under no circumstances ever permit said market to close, but would stand back of said Chamberlains financially and would see to it that said Chamberlains were not in need of funds to open and operate said market; and that, they, defendants, would not permit said market to close, and would see to it that plaintiff would lose nothing whatsoever by said substitution.

(3) Defendants represented to plaintiff that:

(a) They had known the Chamberlains for a long period of time.

(b) They lived in the same town as defendants.

(c) They were well acquainted with the financial responsibility of Ben H. Chamberlain.

(d) Ben H. Chamberlain was a physician and surgeon, with a large practice in Alhambra, and he had been defendants' family physician for many years.

(e) Said Ben H. Chamberlain had a large amount of property.

(f) Chauncey W. Chamberlain was the son of Dr. Chamberlain.

(g) While said Chauncey W. Chamberlain had no property, he was an employee in a responsible position with a bank in Alhambra.

(h) Said Ben H. Chamberlain was desirous of starting his son aforesaid in some business of his own, and for that reason was about to invest $50,000 in a water-bottling venture of which said Chauncey W. Chamberlain should be the proprietor.

(i) Defendants had induced said Ben H. Chamberlain to hold up such investment pending an investigation of this market, and they had induced said Chamberlains to take over this market instead of going into the bottling venture.

(j) Said Ben H. Chamberlain was financially responsible to carry out the terms of such proposed lease and pay the aggregate rental therein provided of $87,000.

(k) Said Ben H. Chamberlain could, and would, furnish plaintiff a financial statement showing such responsibility.

(l) The only reason defendants wished to substitute said Chamberlains was the fact that they had been having a great deal of trouble with said Jake's Place, Inc., arising out of transactions defendants had had with said corporation, and further troubles might develop if said Jake's Place, Inc., learned that defendants had taken over said market themselves.

(4) Ben H. Chamberlain refused to furnish a financial statement to plaintiff, and defendants thereupon reiterated and promised to perform the representations set forth in paragraph (3), supra.

(5) Plaintiff did not know the Chamberlains nor their financial responsibility and relied upon defendants' representations.

(6) The representations and promises made to plaintiff by defendants are false and were known by defendants to be such and made with the intention of deceiving and defrauding plaintiff.

(7) Ben H. Chamberlain at said time was not a man of "great property," but only had property valued at not to exceed $10,000, and not to exceed $3,000 in money with which to take over, rehabilitate, and operate said market, and was relying entirely upon the friendship and professional relations between himself and defendants and the promises of the defendants to loan him all necessary funds to open and operate the market, and on the promises of defendants to see to it that the Chamberlains would lose nothing by entering into said transaction; said Ben H. Chamberlain was not financially responsible to carry out the terms of the lease, and was not able to pay the aggregate rental, and was not financially able to open and carry on a market at all; the true reason defendants wished to substitute for themselves the said Chamberlains was to relieve themselves from all further responsibility on their contract with plaintiff; defendants at no time intended to turn over to said Chamberlains the fixtures, etc., without security, and at no time intended to lend the Chamberlains $10,000, or any further sums, without security; defendants at no time intended to save Chamberlains or plaintiff harmless on account of entering into said transaction, and at no time intended to keep said market open or stand in back of the Chamberlains financially, or to see to it that the market would never close; said Ben H. Chamberlain was not at any time to invest $50,000, or any sum, in a water-bottling venture for his son, and defendants had not induced said Ben H. Chamberlain to hold up said venture pending an investigation of this market, or otherwise, or at all; the defendants at no time intended to lend the Chamberlains such additional sums as would enable them to reopen and operate the market; defendants at no time intended that plaintiff should have a chattel mortgage on said fixtures, etc., as security for the performance of the lease, and defendants at no time intended to see that the Chamberlains were not in need of funds to open and operate the market.

(8) In June, 1931, plaintiff instituted an unlawful detainer action and secured a judgment terminating a lease with Jake's Place, Inc., covering the property described in paragraph (1), supra; and, upon execution being issued, the fixtures in Jake's Place, Inc., were sold to Chauncey W. Chamberlain for $1,050, which sum plaintiff gave to defendants, and, pursuant to the oral contract mentioned in paragraph (2), supra, plaintiff leased said premises to Ben H. Chamberlain and Chauncey W. Chamberlain for a period of ten years.

(9) The defendants delivered to the Chamberlains all the fixtures on the premises for $9,000 and loaned to said Chamberlains the sum of $7,000.

(10) On or about September 1, 1931, defendants refused to advance to the Chamberlains any additional sums of money and on November 2, 1931, brought suit against said Chamberlains to recover the sum of $7,000 theretofore loaned to them, attaching all of the Chamberlains' property, and, upon a judgment being entered in favor of plaintiff against said Chamberlains, said property was sold to defendants, who removed the same from the leased premises hereinbefore described.

(11) Plaintiff had a chattel mortgage upon the personal property of the Chamberlains located on said leased premises.

These are the questions presented for determination:

Did the complaint as amended allege a cause of action for:

First. Breach of the agreement dated May 20, 1931, set forth in paragraph (1), supra?

Second. Breach of the oral agreement entered into by the parties in June, 1931, set forth in paragraph (2), supra?

Third. Fraud and deceit?

Fourth. Defendants' interference with the performance by the Chamberlains of their lease with plaintiffs dated July 3, 1931?

[1] The first question must be answered in the negative. The agreement between plaintiff and defendants dated May 20, 1931, contained this express clause: "said lease to contain a provision that the same may be assigned by the parties of the second part, provided they produce to the first party a satisfactory assignee thereof, and upon such assignment, approved and consented to by the party of the first part, parties of the second part are to be relieved from all other and further liability to the party of the first part under said lease."

Under the facts alleged in the complaint defendants did obtain parties satisfactory to the plaintiff, who entered into a lease with plaintiff dated July 3, 1931, and thereby, under the very terms of the agreement dated May 20, 1931, between plaintiff and defendants, defendants were relieved from all liability under said agreement to plaintiff.

[2] The second question presented by plaintiff, must likewise be answered in the negative. Viewing the allegations most favorable to the plaintiff, the oral agreement provided that defendants would for ten years guarantee that the market located on the leased premises would be kept open and operating. The law is settled that an agreement which by its terms is not to be performed within a year from the making thereof is invalid, unless the same, or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent. Subsection 1, § 1624, Civ. Code.

In the present case the agreement was not in writing and obviously could not be performed within the period of a year. It was therefore invalid and unenforceable.

[3] The third question also must be answered in the negative. Viewing the allegations most favorable to plaintiff, the fraudulent conduct of defendants consisted in making intentionally false oral representations to plaintiff concerning the financial responsibility of the Chamberlains. The law is settled that no evidence is admissible to charge a person upon a representation as to the credit of a third party, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged. Section 1974, Code Civ.Proc.

In the instant case the representations were clearly as to the credit of a third person, and, since they were not in writing, they could not be the basis of a cause of action against defendants. Carr v. Tatum, 133 Cal.App. 274, 24 P.(2d) 195, was a case in which the facts were similar to and the question of law involved identical with that in the instant case, and this court, in a well-considered opinion by Mr. Presiding Justice Houser, arrived at the same conclusion as that reached by us.

[4] The fourth question presented by plaintiff must be answered in the negative.

There is a total absence of any allegation which would have supported a finding that defendants interfered with the Chamberlains' performing their lease with the plaintiff. It is simply alleged that defendants failed to abide by a purported agreement between them and the Chamberlains, to which purported agreement plaintiff was not a party and therefore obviously not in a position to bring an action for its breach.

[5] We will not review the alleged errors in sustaining the demurrer without leave to amend as to the third cause of action in the complaint as amended for the reason that no judgment was entered on this order. The law is settled that an appeal does not lie from an order sustaining a demurrer to a complaint and that such ruling will be reviewed only when a judgment has been entered upon the order. Doran v. Sherman (Cal.App.) 64 P.(2d) 442.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P.J.; WOOD, J.

PROVIDENT LAND CORPORATION v. ZUMWALT et al.*

Civ. 5870.

District Court of Appeal, Third District, California.

Sept. 13, 1937.

Hearing Granted by Supreme Court Nov. 8, 1937.

1. Pleading 🔑214(1)

Allegations of complaint were admitted to be true on demurrer.

2. Constitutional law 🔑143
Waters and water courses 🔑230(2)

The law as it existed at time of issuance of irrigation district bonds entered into and became a part of the contract, and could not thereafter be changed by an act of the Legislature (St.1917, p. 769, § 67a; St.1919, p. 667, § 52; St.1931, pp. 172, 173, §§ 52, 67).

3. Constitutional law 🔑162

The Legislature has no power to give a preference to one bondholder over another bondholder.

4. Constitutional law 🔑205(7)
Waters and water courses 🔑216

Statutory amendment purporting to limit power of irrigation district to purchase any of its bonds not then due attempts to give a preference prohibited by constitutional provision inhibiting Legislature from granting to any citizen or class of citizens privileges or immunities which shall not be granted to all citizens (St.1919, p. 667, § 52; St.1931, p. 172, § 52; Const. art. 1, § 21).

5. Constitutional law 🔑205(4)

While the Legislature has power to alter the remedy for the enforcement of a contract, it does not possess the power to so alter the remedy for the enforcement of a contract as to exclude any of the contracting parties from privileges and immunities granted to other parties.

6. Constitutional law 🔑143

The Legislature has no authority to so amend acts under which bonds are issued and sold so as to exclude any method of redemption which has been provided for in the act under which the bonds have been issued and sold, and any such legislation is ineffective as to bonds issued prior to the legislative act taking away such provision.

7. Waters and water courses 🔑228

An irrigation district and its board of directors possess only such powers as are specified in the irrigation laws, and these powers must be exercised in the mode prescribed therein.

8. Pleading 🔑8(6)

An allegation that irrigation district had duly and legally issued its 6 per cent. series coupon bonds was sufficient as against general demurrer based on ground that such allegation was conclusion of the pleader (Code Civ.Proc. § 459).

9. Waters and water courses 🔑230(8)

An action by bondholder of irrigation district to recover and restore to treasury of irrigation district the sum of $10,000 alleged to have been unlawfully paid by directors of district to defendant bondholders was not barred on ground that it was in the nature of a creditor's claim, and that bondholders of district had no lien on property thereof, but was maintainable as an action to recover, for the benefit of the district, moneys alleged to have been illegally expended (St.1917, p. 769, § 67a; St.1919, p. 667, § 52; St.1931, pp. 172, 173, §§ 52, 67; St.1935, p. 1589, § 33).

*For subsequent opinion see 85 P.2d 116.

10. Waters and water courses ⚷230(8)

In general, it is the right of every irrigation district bondholder to insist in a court of equity that moneys of the district be expended legally, and that any moneys illegally expended be recovered for the benefit of the district.

11. Waters and water courses ⚷230(8)

An action by irrigation district bondholder to recover and restore to treasury of irrigation district the sum of $10,000 alleged to have been unlawfully paid by directors of district to defendant bondholders was not an action to discover and apply property in payment of a judgment of creditors' claim, but was merely an action to enforce refunding of money alleged to have been illegally disbursed (St.1917, p. 769, § 67a; St.1919, p. 667, § 52; St.1931, pp. 172, 173, §§ 52, 67; St.1935, p. 1589, § 33).

12. Waters and water courses ⚷228

All property belonging to irrigation district, including proceeds derived from leases of lands which have been conveyed to district, constitute trust properties.

13. Trusts ⚷349

Where trust funds have been diverted, they may be followed and, if identified, recovered.

14. Trusts ⚷349

Equity will follow trust funds wherever they may be found.

15. Waters and water courses ⚷228

Irrigation district statute providing that district which has purchased property and acquired deed shall have the same rights thereto as a private purchaser, and that title might be conveyed by deed, does not relieve property from the trust imposed upon it that the property shall be used for the benefit of all persons including bondholders, interested in the district (St.1935, pp. 463, 482, §§ 29, 47).

16. Waters and water courses ⚷230(8)

Although irrigation district laws in mentioning the remedies of bondholders include nothing further, by express provisions, than the right to enforce the levy of assessments, the right to enforce collection necessarily follows as a corollary thereto.

17. Waters and water courses ⚷230(8)

Equity will enforce rights of bondholders in proceeds of lands which have become delinquent and title to which has been vested in irrigation district for and on account of assessments levied to pay the bonded indebtedness of the district.

18. Waters and water courses ⚷230(8)

Assessments collected by irrigation district are funds impressed with a trust in favor of bondholders, whereas proceeds of leased lands are impressed with a trust in favor of all purposes mentioned in irrigation district laws, which necessarily includes the payment of bonded indebtedness of district (St.1935, pp. 463, 482, §§ 29, 47).

19. Trusts ⚷183

The rents, issues, and profits derived from trust properties follow the corpus and become a part of the trust funds.

20. Waters and water courses ⚷230(8)

Statutory trust imposed on moneys in hands of board of directors of irrigation district which includes irrigation district bondholders as beneficiaries consists of all moneys regularly paid upon installment calls, all moneys from sales of land on account of delinquencies and moneys received on account of redemptions therefrom, all moneys derived from resale of lands purchased as trustee for bond fund, and the land itself (St.1935, pp. 463, 482, §§ 29, 47).

21. Waters and water courses ⚷228

Placement by directors of irrigation district of proceeds derived from leased premises in general fund instead of in bond fund did not render such proceeds surplus funds or make such funds available for purchase of bonds without any attempt to comply with provisions of irrigation district laws setting forth mode and measure of powers of board in purchasing bonds (St.1917, pp. 765, 769, §§ 39a, 67a; St.1931, pp. 172, 173, §§ 52, 67; St.1935, pp. 463, 482, §§ 29, 47; p. 1589, § 33).

22. Waters and water courses ⚷230(8)

All parties engaged in illegal transaction whereby directors of irrigation district purchased limited number of its outstanding bonds from funds held in trust for all bondholders, without observance of statutory requirements, including the parties whose bonds were thus purchased, were necessary parties to action by other bondholder to recover and restore the purchase money to the district, and were liable for any illegal diversion of the funds of the district (St.1917, pp. 765, 769, § 39a, 67a; St.1931, pp. 172, 173, §§ 52, 67; St.1935, pp. 463, 482, §§ 29, 47; p. 1589, § 33).

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Action by the Provident Land Corporation against I. G. Zumwalt and others. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Louis Bartlett, of San Francisco (W. S. McGuire, of San Francisco, of counsel), for appellant.

Rutledge & Rutledge, of Colusa, for respondent Zumwalt.

George R. Freeman, of Willows, for other respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The amended complaint in this action sought to recover of and from the defendants, and restore to the treasury of the Provident Irrigation District, the sum of $10,000 alleged to have been unlawfully paid by the directors of the district to certain bondholders. To this complaint the defendants filed a general demurrer which, being sustained, and plaintiff declining further to amend, judgment was entered in favor of the defendants. From this judgment the plaintiff appeals.

The complaint alleges the corporate existence of the plaintiff, and then alleges the organization of the Provident Irrigation District as having taken place on or about the 6th day of May, 1918. The second paragraph of the complaint names the officers of the district at the time of the transactions complained of. Paragraph IV of the complaint alleges the issuance by the Provident Irrigation District of bonds in the sum of several hundred thousand dollars; that of the bonds so issued $152,000 are and were past due as principal, and at the time of the beginning of the action, and during the time of the proceedings complained of, there was also due upon said bond issue, and unpaid, interest coupons in the sum of $225,000. Paragraph IV further alleges that the plaintiff is the owner of bonds of said district of the face value of $86,000; that said bonds are past due and unpaid; and that plaintiff is the owner of unpaid and past-due interest coupons in the sum of $125,000, and was such owner and holder at the time of the transactions complained of herein. Paragraph V of the complaint alleges the presentation of payment of past-due bonds, and also of past-due and unpaid interest coupons, and that no part thereof was or has been paid. Paragraph VI of the complaint alleges that on the 7th day of January, 1936, there was in the general fund of the Provident Irrigation District the sum of $10,000; that said district disbursed said $10,000 in the purchase of fifty bonds of the district, with coupons attached as follows: From the Capital National Bank of Sacramento, bonds of the face value of $17,000; from I. G. Zumwalt, bonds of the face value of $16,000. Paragraph VI of the complaint further alleges that prior to January 7, 1936, the district held title, by collector's deeds issued to it, to over 10,000 acres of land within the district. Such deeds were issued on account of delinquent assessment sales of said lands for assessments levied thereon for the payment of interest and payment of bonds of said district. That, after alleging the amount received on account of leases of said land, it is further alleged in paragraph VI that the $10,000 referred to in the complaint as having been expended in the purchase of certain bonds, the whole of said sum came from the proceeds of leases upon the lands just referred to. That the $10,000 was paid out as aforesaid while the district was in default in the sum of about $360,000 on account of past-due and unpaid bonds and past-due and unpaid interest coupons.

Paragraph VII of the complaint alleges that on or about the 7th day of January, 1936, the board of directors declared that, of the proceeds just mentioned, there was then in the general fund the sum of $10,000. This sum was declared by resolution to be a surplus, and was thereupon set aside for the purchase of bonds of the district. The paragraph further alleges that on the 4th day of February, 1936, the board of directors, by resolution, provided for the purchase of the face value of $50,000 worth of said bonds, with coupons attached, for the sum of $10,000, as hereinbefore stated. And it is further alleged in the paragraph that none of the bonds were past due and registered by the treasurer of the district prior to the registration of past-due and registered bonds and coupons owned by plaintiff; that the resolution adopted by the board of directors did not name or otherwise specify the day, hour, and place of such proposed purchase of bonds, nor was any notice given of such proposed purchase by publication, nor was any notice given inviting sealed proposals, or stating that sealed proposals would be received by the board at their office for the purchase of bonds, nor were any sealed proposals received therefor.

It is further alleged that the board did not give any notice to any bondholders, other than those mentioned in the complaint, that it would receive proposals for the sale and purchase of bonds; that the said board, instead of publishing notice, had previously agreed with Zumwalt, Benoit, and the Capital National Bank to purchase from each of said persons the number of bonds mentioned in the complaint at 20 per cent. of the face value thereof; that there was paid thereon by the district to the defendant Zumwalt the sum of $3,400. The prayer of the complaint is that the attempted sale to the district by said Zumwalt of seventeen bonds and coupons attached be declared void; and that judgment be entered for the return of $3,400 to the treasurer of the district, so unlawfully paid out by the officers of the district, and unlawfully received by the defendant Zumwalt.

To this complaint the defendants interposed a general demurrer as follows: (1) That there is a misjoinder of parties-defendant in this, that the said I. G. Zumwalt is not a proper person defendant in said action, and that said complaint does not state facts sufficient to constitute a cause of action against the defendant Zumwalt; (2) that said amended complaint does not state facts sufficient to constitute a cause of action.

At the time of the issuance of the bonds mentioned herein, section 52 of the California Irrigation District Laws (St.1897, p. 272, as amended by St.1919, p. 667), among other things, provided as follows: "Whenever the bond fund contains ten thousand dollars in excess of the amount necessary to pay all bonds and interest coupons of the district that have matured or that will mature before the time when any part of the next annual assessment to be levied in the district will become delinquent, the board of directors may advertise, in the manner hereinbefore provided for the sale of bonds, for the receipt of sealed proposals for the delivery to the district for redemption of any of its bonds not due. Said advertisement shall state the amount which may be used for the redemption of such bonds. Any such proposals shall be opened by the board in open meeting at the time named in said advertisement, and the offer or offers of such bonds at the lowest rate or rates shall be accepted."

In 1931 (Stats.1931, p. 172), section 52 of the California Irrigation District Laws was amended so as to omit all of the foregoing in relation to the redemption of bonds, and in place thereof the following was inserted: "Whenever there is in any fund of the district money in excess of that required for the purposes of such fund up to the time when any part of the next annual assessment levied in the district will become delinquent, the board of directors of the district may purchase with such surplus money, or any part thereof, any of its bonds not then due, and may cancel the bonds so purchased or hold the same as a part of its assets until such time as the board may determine that it is for the best interests of the district that such bonds or any of them be sold, or shall cancel the same at their date of maturity."

[1] From the allegations contained in the complaint, which upon demurrer are admitted to be true, it is apparent that the board of directors of the Provident Irrigation District, without regard to the rights of different bondholders of the district, and without notice to any of them, selected a few of the bondholders and negotiated with them for the redemption of bonds, thus giving preferential privileges and opportunities to a selected few of the bondholders.

While there was a due and unpaid indebtedness of the district in the sum of $360,000 on account of bonds and interest coupons, the passing of a resolution that there was a surplus in the sum of $10,000 for the redemption of bonds did not change the fact that such surplus did not exist.

Section 67a of the California Irrigation District Laws (St.1897, p. 254, as added by St.1917, p. 769) provides that, whenever an object for which money has been specifically provided by assessment, or by bond issue, has been accomplished, and any money provided therefor remains unexpended, the same shall, in the discretion of the board of directors, be transferred to the general fund, and thereafter be available for any of the purposes of the act.

It will be observed that section 67a, supra, refers, specifically to money which has been realized on account of assessments theretofore levied, and has of course been earmarked in the proceedings leading up to and culminating in the assessment. Section 67 of the act as amended in 1931 (Stats.1931, p. 173) provides for the creation of a bond principal fund, bond interest fund, construction fund, and general fund. The $10,000, the validity of the expenditure of which is challenged in this proceeding, was not realized or obtained by way of an assessment, but was and is moneys realized from the leasing of lands, the title to which had become vested in the district by reason of failure of the owners thereof to pay assessments theretofore levied upon such lands.

[2, 3] That the law as it existed at the time of the issuance of the bonds entered into and became a part of the contract which could not thereafter be changed by an act of the Legislature is clearly shown and fully discussed in the case of Hershey et al. v. Cole, 130 Cal.App. 683, 20 P.(2d) 972, and need not be repeated herein; and that the Legislature has no power to give a preference to one bondholder over another bondholder is likewise fully considered and discussed in the case of Rivers Farm Co. v. Gibson, 4 Cal.App.(2d) 731, 42 P.(2d) 95, and a reference thereto we deem sufficient without repeating the language used therein or again citing the authorities there relied upon.

[4] The amendment to section 52, supra, purports to limit the power of the district to purchase "any of its bonds not then due," attempting to give a preference prohibited by section 21 of article 1, of the Constitution, which inhibits the Legislature from granting to any citizen or class of citizens privileges or immunities which shall not be granted to all citizens.

[5, 6] While the Legislature has power under the authorities to alter the remedy for the enforcement of a contract, it does not under the authorities possess the power to so alter the remedy for the enforcement of a contract as to exclude any of the contracting parties from privileges and immunities granted to other parties. Nor has the Legislature authority to so amend acts under which bonds are issued and sold so as to exclude any method of redemption which has been provided for in the act under which the bonds have been issued and sold, and any such legislation is inoperative and ineffective as to bonds issued prior to the legislative act taking away such provision.

[7] The complaint further alleges that the defendants had knowledge of all the matters alleged in the complaint showing the illegality of the transaction. We do not need to cite authorities to the effect that an irrigation district and its board of directors possess only such powers as are specified in the irrigation laws, and that those powers must be exercised in the mode prescribed therein. With these preliminaries we will take up the different points urged by the respondents against the sufficiency of the amended complaint to state a cause of action.

[8] It is first contended that the allegation in the complaint that the district had duly and legally issued its 6 per cent. series coupon bonds is a conclusion of the pleader. This contention was squarely answered by this court in its opinion in the case of Jordan v. Williams Irrigation District, 13 Cal.App.(2d) 465, 57 P.(2d) 566. It was there held that such an allegation was sufficient as against the general demurrer. To the same effect is the case of Frasch v. London, etc., 213 Cal. 219, 2 P.(2d) 147.

The respondents rely mainly upon the case of Noble et al. v. Provident Irrigation District et al., 10 Cal.App.(2d) 284, 51 P.(2d) 896. There the action sought to compel the conveyance to the district of lands alleged to be in default in the payment of delinquent assessments for more than three years. That was an action in invitum, and this court held that, in order to determine the right to the relief demanded, an investigation of the proceedings leading up to a tax sale would have to be made and should be set forth in the complaint. That case is readily distinguishable from the pleading in the instant case. Here, the pleading is governed by the provisions not alone of the cases which we have cited, but also by section 459 of the Code of Civil Procedure, where it is said: "In pleading the performance of conditions precedent under a statute or an ordinance of a county or municipal corporation, or of a right derived therefrom, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions," etc.

Following the case of Jordan v. Williams Irrigation District, supra, it must be held that the objections urged on demurrer to the complaint in this particular are not well taken.

[9, 10] It is next contended that the complaint is in the nature of a creditor's claim, and that the bondholders of an irrigation district have no lien on any of the property of the district or the lands in the district, and are merely creditors, citing section 33 of the California Irrigation District Laws (St.1897, p. 265, as amended by St.1935, p. 1589) which reads: "Said bonds and the interest thereon shall * * * be paid from revenue derived from an annual assessment upon the land within the district, and all the land within the district shall be and remain liable to be assessed for such payments, as hereinafter provided." It may be stated that the cases cited in support of the contention of the respondents do not establish the fact that this is an action in the nature of a creditor's claim. While the cases cited do show that the bondholders may, under the California Irrigation District Laws, compel certain actions, this is not an action to recover a certain sum of money and have it specifically applied to the payment of any particular claim or bond or interest coupon owned by the plaintiff. It is an action to recover for the benefit of the district moneys alleged to be illegally expended. Speaking generally, we conclude that it is the right of every bondholder to insist in a court of equity that the moneys of the district be expended legally, and that any moneys illegally expended be recovered for the benefit of the district.

[11] It may be further stated that this is not an action to discover and apply property in payment of a judgment of creditors' claim, but is simply an action to enforce the refunding of money alleged to be illegally and improperly disbursed.

[12-14] Again, all the property belonging to the district, including the proceeds derived from the leases of lands which have been conveyed to the district, constitute trust properties. Thus, as stated in substance in 65 C.J. p. 936, where trust funds have been diverted, they may be followed, and, if identified, recovered. Equity will follow trust funds wherever they may be found. The cases are so numerous in support of the foregoing statements that we do not need to cite them.

[15] Again the respondents call our attention to the provisions of section 47 of the California Irrigation District Laws (St.1897, p. 270, as amended by St.1935, p. 482), which specifies that, where property has been sold to the district and a deed has been given to the district as a purchaser, such district shall have the same rights thereto, and to the rents, issues, and profits thereof, as a private purchaser, and that the title so acquired by the district may be conveyed by a deed executed and acknowledged by the president and secretary of the board of directors, etc. This does not change the character of the property; this does not relieve the property from the trust imposed upon it that the property shall be used for the benefit of all persons interested in the district. In other words, while it may not be urged that property so acquired is held exclusively in trust for the benefit of the bondholders, it may, we think, be properly urged that such property is held, as well, in trust for the benefit of the bondholders, as for any of the other purposes mentioned in the California Irrigation District Laws.

Section 29 of the California Irrigation District Laws (St.1897, p. 263, as amended by St.1935, p. 463) reads in part: "The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district and shall be held by such district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this act." The purposes of the act, among many other provisions, do specifically mention the payment of its bonded indebtedness and of the interest coupons, as well as the general expenses of conducting the operations of the district.

[16, 17] In this particular our attention is called to some of the cases which state that under the California Irrigation District Laws bondholders have the right to enforce their demands solely by an annual assessment on the lands of the district, etc. It is true that the Irrigation District Laws, in mentioning the remedies of bondholders, include nothing further, by express provisions, than the right to enforce the levy of assessments. But as a necessary corollary thereto the right to enforce collection would necessarily follow.

The contention of the respondents that such is the only remedy of a bondholder would, if carried to its ultimate conclusion, result in the complete effacement of the bondholders. Thus, if all of the lands were allowed to go delinquent on account of assessments, to pay interest coupons or bonds falling due, and by sale and purchase become vested in the district, a complete elimination of the bonded indebtedness would be effected if the proceeds of the lands so reverting to the district are beyond the reach of the bondholders. We think this statement, which shows how the argument of the respondents would lead to a complete repudiation of the bonded indebtedness of the district, is a complete answer to the statement that equity will not lend its aid to enforce the rights of the bondholders as against the proceeds of lands which have gone delinquent and the title to which has been vested in the district for and on account of assessments levied to pay the bonded indebtedness of the district.

[18, 19] The same principles which this court followed in the case of Rivers Farm Co. v. Gibson, 4 Cal.App.(2d) 731, 42 P.(2d) 95, 100, are applicable here. This court there said: "Assessments collected are public funds, impressed with a trust in favor of bondholders." The exception which we have noted is to the effect, as set forth in section 29, supra, that the moneys in the hands of the board of directors of an irrigation district, arising as proceeds of leased lands, are impressed with a trust in favor of all of the purposes mentioned in the act, which necessarily includes the payment of the bonded indebtedness of the district. We do not need to cite other authorities than 65 C.J. p. 690, that the rents, issues, and profits derived from trust properties follow the corpus and become a part of the trust funds.

[20] Section 29, supra, we think brings the instant case squarely within the provisions of Rivers Farm Co. v. Gibson, supra. In that case the court was considering what constitutes trust property, and there said: "The section of the Code and the cases which we have just cited we think clearly establish the following propositions: First. That the trust consists of all moneys regularly paid upon instalment calls; second, all moneys derived from the sales of land on account of delinquencies, including all moneys received on account of redemptions therefrom; third, all moneys derived from the resale of lands purchased by the treasurer as trustee for the bond fund, or as trustee for the district; fourth, the land itself, or the corpus of all parcels or tracts bought in by the county treasurer, and subsequently deeded to himself under the title of trustee for the district." All that is needed to make this language applicable to the instant case is the substitution of the proper officers in the place of the officers referred to in the Gibson Case. The principle is exactly the same, save and except as the property is held in trust for somewhat more extensive purposes. In this particular we may also cite the case of Shouse v. Quinley, 3 Cal.(2d) 357, 45 P.(2d) 701.

[21] The mere fact that the board of directors of the district placed the proceeds derived from the leased premises in the general fund instead of in the bond fund did not render such proceeds surplus funds or make such funds available for the purchase of bonds, without any attempt to comply with the provisions of the California Irrigation District Laws, setting forth the mode and the measure of the powers of the board in the purchasing of bonds.

Section 39a of the California Irrigation District Laws (St.1897, p. 254, as added by St.1917, p. 765) provides that, when the assessments are collected, the moneys paid into the district treasury shall be apportioned to the proper funds. In the instant case the delinquency occurred in the failure to pay that portion of the assessment which had been levied for the purposes of paying the indebtedness of the district, evidenced by the bonds and the interest coupons thereon, and the board of directors could not, by disregarding this fact, place the whole sum in what was called the general fund, and call it surplus, and then disburse the same as alleged in the complaint. If such sum is not available as trust funds for the payment of interest coupons long due, then, as we have stated heretofore, the door is opened for the repudiation of the bonded indebtedness of the district.

[22] All of the parties engaged in the illegal transaction relative to the sale and purchase of the bonds referred to in the complaint are necessary parties to the action and are liable for any illegal diversion of the funds of the district.

As against the general demurrer, we think the amended complaint states a cause of action.

The judgment of the trial court is reversed, with directions to overrule the demurrer interposed by the defendants and allow the defendants to file answers, if so advised, within such reasonable time as the court may fix.

We concur: PULLEN, P. J.; THOMPSON, J.

PROVIDENT LAND CORPORATION (a Corporation), Plaintiff and Appellant, v. PROVIDENT IRRIGATION DISTRICT, etc., et al., Defendants and Respondents.*

Civ. 5871.

District Court of Appeal, Third District, California.

Sept. 13, 1937.

Hearing Granted by Supreme Court Nov. 8, 1937.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Louis Bartlett, of San Francisco (W. S. McGuire, of San Francisco, of counsel), for appellant.

George R. Freeman, of Willows, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action involves the same questions considered in Provident Land Corp. v. Zumwalt (Cal.App.) 71 P.(2d) 825, and by reason of what is stated in the opinion in that case filed this day, and reference to which is hereby made, the judgment is reversed, with directions to the trial court to overrule the demurrer interposed by the defendants and allow the defendants, if so advised, to file answers within such reasonable time as the court may determine.

We concur: PULLEN, P. J.; THOMPSON, J.

PROVIDENT LAND CORPORATION (a Corporation), Plaintiff and Appellant, v. Georgie BENOIT, as Administratrix, etc., et al., Defendants and Respondents.*

Civ. 5872.

District Court of Appeal, Third District, California.

Sept. 13, 1937.

Hearing Granted by Supreme Court Nov. 8, 1937.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Louis Bartlett, of San Francisco, (W. S. McGuire, of San Francisco, of counsel), for appellant.

George R. Freeman, of Willows, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action involves the same questions considered in Provident Land Corp. v. Zumwalt (Cal.App.) 71 P.(2d) 825, and by reason of what is stated in the opinion in that case filed this day, and reference to which is hereby made, the judgment is reversed, with directions to the trial court to overrule the demurrer interposed by the defendants and allow the defendants, if so advised, to file answers within such reasonable time as the court may determine.

We concur: PULLEN, P. J.; THOMPSON, J.

---

*For subsequent opinion see 85 P.2d 122.

22 Cal.App.2d 570

MAZGEDIAN v. SWIFT & CO. et al.

Civ. 11328.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1937.

1. Negligence ⚷82

One whose violation of statute contributed proximately to accident alleged to have been caused by another's negligence cannot recover judgment against latter for resulting injuries.

2. Automobiles ⚷226(2)

A truck driver, giving no signal of intention to stop or suddenly decrease speed, as he had opportunity to do, was guilty of contributory negligence proximately contributing to collision of another truck, following from 6 to 20 feet behind at 6 to 10 miles per hour, with rear of plaintiff's truck, so as to preclude him from recovering for resulting injuries (St.1935, p. 185, § 544(c).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Vahan Mazgedian against Swift & Co. and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Hugh B. Rotchford, of Los Angeles (Robert E. Ford, of Los Angeles, of counsel), for appellants.

A. M. Astor, Hooper & Miller, and Lloyd O. Miller, all of Los Angeles, for respondent.

HOUSER, Presiding Justice.

The pertinent facts appear to be that at the time herein in question, plaintiff was the driver of a truck on a "one-way" street, and that while acting in such capacity, as he approached a street which intersected that on which he was driving, his progress in the direction in which he was traveling was obstructed by a parallel line of automobiles which theretofore had been formed by reason of the fact that traffic was controlled at said intersection by "stop-and-go" signals. With reference to such automobiles, it further appears that notwithstanding nothing had obscured plaintiff's vision thereof, up to a point where plaintiff had arrived within 15 or 20 feet of the last automobile in said line of traffic, he had failed to see that none of said automobiles was moving or that the last automobile in said line was stationary. However, immediately after his discovery of that situation, he applied the brakes ("hard") on the truck that he had been driving, and thereupon the truck was stopped within 2 or 3 feet of the last automobile in the line of traffic. Although plaintiff had knowledge of the fact that his truck was preceding another truck that was then being driven by defendant Leslie, at no time did plaintiff give a signal of any kind that would have indicated his intention either to "suddenly decrease" the speed at which theretofore he had been driving his truck, or to bring it to a stop, notwithstanding the fact that he had "opportunity to give such signal." Subdivision (c), section 544, Vehicle Code (St.1935, p. 185). In that regard, as a reason for such failure on the part of plaintiff, he testified variously, but in part as follows:

"Q. When had you seen the Swift truck behind you, prior to the time you stopped? A. Just before I stopped.

"Q. And how far back was it then? A. You mean how far back was he?

"Q. Yes. A. Oh, about half a block or so. * * *

"By Mr. Rotchford (defendants' counsel, reading from plaintiff's deposition): '* * * Q. He followed you down the street? A. Yes, he followed me down the street. Q. About how close behind you was he following you? A. I couldn't say. Q. A matter of a few feet? A. Yes.'

"Q. Now, Mr. Mazgedian, you told us that he was about half a block behind you. Which do you want me to believe? A. Well, a few feet, a half a block is about the same thing, because I didn't say exactly how far.

"Q. In your opinion a few feet is the same as half a block, is that right? A. Well, I didn't say exactly how far he was, because I don't—I couldn't say for sure.

"Q. Did you give any signal? A. No, because the truck was not right behind me at that time.

"Q. You have told me that the truck was following you all the way. A. But he wasn't that close to me.

"Q. Where was he? A. I don't know how far.

"Q. You did not even look to see where he was, is that right? A. I knew he was following me, because when I turned on Santa Barbara Avenue (approximately two blocks from the point where the accident occurred) I saw him then, but I don't know how far he was from me when I stopped."

"About the same instant" after plaintiff had stopped his truck, and "before the signal said 'go'," the truck that at that time was being driven by defendant Leslie collided with the rear of plaintiff's truck, as a result of which plaintiff sustained certain personal injuries, for and on account of which, in the superior court, in an action there instituted by him, he recovered a judgment against the defendants. It is from that judgment that the instant appeal is taken.

Appellants urge the point that plaintiff was guilty of contributory negligence, and hence that the judgment should be reversed. In that connection it is noted that subdivision (c) of section 544 of the Vehicle Code of this state provides that "No person shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal in the manner provided in this chapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal."

[1] In an action to recover a judgment for personal injuries which are alleged to have ensued from an accident that was caused by the negligence of the defendant therein, it is established law that, where it appears that the violation of a statute by the plaintiff is shown to have contributed proximately to the happening of the accident, the plaintiff is not entitled to recover a judgment.

[2] In the instant case, although according to plaintiff's testimony he was traveling at a rate of 15 to 20 miles per hour, it is undisputed that neither immediately nor at all before stopping the truck that he had been driving did plaintiff give any signal of his intention either to stop the truck or to "suddenly decrease" its speed. Nor is it asserted that plaintiff had no "opportunity to give such signal." Defendant Leslie testified that, immediately preceding the time when the accident occurred, he drove his truck behind that which plaintiff was then operating at a distance therefrom of from 6 to 20 feet, and at a speed of from 6 to 10 miles per hour up to the instant when his truck struck plaintiff's truck, at which time he estimated his speed at 2 miles per hour. In such circumstances, whatever properly may be said regarding the negligence of defendant, it is a fair conclusion that, had plaintiff given a timely and "an appropriate signal" of his intention to stop his truck, defendant might have been able to stop the truck which he was driving in time to prevent it from colliding with the truck which plaintiff was then driving. At any rate, it is clear that plaintiff's negligence in the premises proximately contributed to the happening of the accident.

It becomes unnecessary to consider other points that are presented by appellants.

The judgment is reversed.

We concur: YORK, J.; DORAN, J.

DRUMMEY et al. v. STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS et al.*

Civ. 10476.

District Court of Appeal, First District, Division 2, California.

Sept. 20, 1937.

Rehearing Granted Oct. 20, 1937.

1. Constitutional law ⚷48

All presumptions are in favor of the constitutionality of an act, all doubts being resolved in favor of and not against its validity, and conflict with Constitution must be clear before statute will be declared invalid.

2. Licenses ⚷7(1)

Statute authorizing suspension of embalmers' licenses for unprofessional conduct, consisting of solicitation of human dead bodies by licensee, is not unconstitutional as being uncertain, vague or indefinite in language or purpose of the act (Gen. Laws Supp. 1933, Act 2318, § 15, subd. 2(c).

3. Licenses ⚷38

Purpose of statute authorizing suspension of embalmers' licenses for unprofessional conduct, consisting of solicitation of human dead bodies, is not to prevent general advertising, but is aimed to prevent direct solicitation of particular dead human bodies by overzealous funeral directors and embalmers in the conduct of their business (Gen.Laws Supp.1933, Act 2318, § 15, subd. 2(c).

---

*For subsequent opinion see 77 P.2d 912.

4. Statutes 🔑47

A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language, mere doubts as to its construction being insufficient to justify disregarding it, and mere difficulty in ascertaining its meaning or the fact that it is susceptible of different interpretations will not render it nugatory.

5. Licenses 🔑7(1)

Statute authorizing suspension of embalmers' licenses for unprofessional conduct, consisting of solicitation of human dead bodies by licensee, is not unconstitutional as an arbitrary exercise of power, but rather is a reasonable regulation bearing definite relation to the public welfare (Gen.Laws Supp.1933, Act 2318, § 15, subd. 2(c).

6. Health 🔑31

The business of both funeral directors and embalmers is subject to regulation under the police power, and Legislature was authorized to provide for protection of public from annoyance of direct solicitation of human dead bodies (Gen.Laws Supp.1933, Act 2318, § 15, subd. 2(c).

7. Constitutional law 🔑287
Licenses 🔑7(1)

Statute authorizing suspension of embalmers' licenses after proper hearing and notice to licensee is not unconstitutional as failing to afford due process (Gen.Laws Supp. 1933, Act 2318, § 15, subd. 2(c).

8. Constitutional law 🔑309(1)

"Due process" does not require any particular form or method of procedure, but is sufficient if reasonable notice and reasonable opportunity to be heard and present any claim or defense are afforded; due regard being had to the nature of the proceedings and the character of rights which may be affected by it.

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

9. Constitutional law 🔑287

Revocation of embalmers' licenses after hearing of which one of licensees was notified by personal service and other by actual notice by receiving copy thereof left at his place of business, both notices being received at a date giving reasonable time before hearing at which both licensees actually appeared, and were given an opportunity to be heard and present any defense, was not subject to challenge that licensees were not afforded "due process" by the board (Gen. Laws Supp.1933, Act 2318, § 15, subd. 2(c).

10. Officers 🔑107

Proceedings before administrative boards are not ordinarily governed by technical rules of pleading and practice, but complaint should be sufficient to fully advise on its face what the charge is.

11. Licenses 🔑38

In proceeding for revocation of embalmers' licenses for unauthorized solicitation of business, complaint charging in each of several counts that person charged did on or about specified date and at a specified place solicit for preparation for burial and for burial of the dead body of a named person, such person being then dead, was sufficient to show violation of the statute (Gen.Laws Supp.1933, Act 2318, § 15, subd. 2(c).

12. Licenses 🔑38

Competency of evidence supporting action of board in suspending an embalmer's license and a funeral director's license, to which no objection was made before board, could not be questioned for first time in proceeding before trial court to review board's action and to dismiss the proceedings against licensees.

13. Licenses 🔑38

Licensees' right to question competency of evidence supporting action of board in suspending of licenses, in proceeding before trial court seeking a review of board's action and the dismissal of proceedings against them, was no broader than right of an appellant to raise such questions on a direct appeal from a judgment.

14. Appeal and error 🔑989

In determining sufficiency of evidence to sustain trial court's decision, appellate court will consider all proper evidence embraced in record, including incompetent evidence admitted without objection.

15. Appeal and error 🔑837(11)

The competency of evidence to support trial court's decision is not before appellate court where it is admitted without objection, and failure to object precludes right to subsequently complain thereof; incompetent evidence admitted without objection being legally sufficient to establish a fact.

16. Licenses 🔑38

Evidence *held* sufficient to sustain findings and judgment of board suspending embalmer's license and funeral director's license (Gen.Laws Supp.1933, Act 2318, § 15, subd. 2(c).

17. Licenses ⟹38

Where it was agreed before State Board of Funeral Directors and Embalmers that proceeding for suspension of embalmer's license could be deemed dismissed, board's subsequent order suspending such embalmer's license was an abuse of discretion (Gen. Laws Supp.1933, Act 2318, § 15, subd. 2(c).

18. Mandamus ⟹64

Mandamus will lie to confine the discretion of the State Board of Funeral Directors and Embalmers within legal limits.

◆

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Mandamus proceeding by William P. Drummey and others against the State Board of Funeral Directors and Embalmers and others. Judgment ordering that a peremptory writ of mandamus issue, and respondents appeal.

Affirmed in part, and reversed in part.

Bianchi & Hyman and A. B. Bianchi, all of San Francisco, and Tinning & DeLap, of Martinez, for petitioners.

Frank J. Barry, of Los Angeles, for respondents.

SPENCE, Acting Presiding Justice.

This is an appeal by the State Board of Funeral Directors and Embalmers and the members thereof from a judgment of the trial court ordering that a peremptory writ of mandamus issue commanding said board to dismiss certain proceedings against petitioners and to admit petitioners to the use and enjoyment of their respective licenses. Another appeal was taken by petitioners from certain orders of the trial court with respect to their petitions for a writ of certiorari and a writ of prohibition. The appeal of petitioners may be dismissed as they have expressly abandoned said appeal. For the sake of clarity and brevity we will refer to parties as the petitioners and the board throughout this discussion.

Petitioner William P. Drummey was a duly licensed embalmer. Petitioner Aubrey Wilson was a duly licensed funeral director doing business under the name of Wilson & Kratzer. Petitioner Aubrey Wilson was also a duly licensed embalmer. Their licenses had been issued under the provisions of the Funeral Directors and Embalmers Law (Deering's General Laws Supp. 1933, Act 2318). Three separate complaints were filed with the board charging petitioners with unprofessional conduct as defined in said act and praying for the suspension or revocation of their respective licenses. Each complaint contained several counts in which the unprofessional conduct was alleged to consist of solicitation under section 15 of said act. Said section provides in part: "The board shall also have the power to suspend or revoke licenses after proper hearing and notice to the licensee, upon such licensee being found guilty of any of the following acts or omissions: * * * 2. Unprofessional conduct which is hereby defined to include: * * * (c) Solicitation of human dead bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs after death or while death is impending; providing, this shall not be deemed to prohibit general advertising." After notice to petitioners, a hearing was had on all three complaints. Petitioners appeared at the hearing and while they were not represented by counsel, they were apprised of their right to be so represented. They expressed no desire to exercise that right, but proceeded to act for themselves and to cross-examine the witnesses. At the conclusion of the hearing, they were found guilty of several of the counts set forth in the respective complaints. An order based upon written findings was entered as to each complaint. The embalmer's license of each of petitioners was suspended for one year. The funeral director's license of petitioner Wilson was suspended for one year with a proviso that after ten days of said suspension, the licensee should be restored to good standing but should be immediately suspended for the remaining portion of the year upon the violation within two years of any of the provisions of the act.

Thereafter petitioner Drummey filed a petition for a writ of review seeking to review the proceedings whereby his embalmer's license was suspended. Petitioner Wilson filed a petition seeking to review the proceedings whereby his embalmer's license and also the funeral director's license of Wilson & Kratzer were suspended. The writs were issued and return was made. During the pendency of the proceedings, the Supreme Court handed down its decision in Standard Oil Co. v. State

Board of Equalization, 6 Cal.(2d) 557, 59 P.(2d) 119. The proceedings having been consolidated for hearing in the trial court, petitioners filed an amendment to their petitions seeking to invoke the remedies of either review, prohibition, or mandamus. Demurrers were interposed to the petitions as thus amended. The trial court sustained the demurrers to the petitions for writs of review (Standard Oil Co. v. State Board of Equalization, supra), and to the petitions for writs of prohibition (Whitten v. California State Board of Optometry (Cal.Sup.) 65 P.(2d) 1296), but overruled the demurrers to the petitions for writs of mandamus and ordered that an alternative writ issue. Upon the subsequent hearing, the matter was submitted upon the record on file and the trial court ordered that a peremptory writ of mandamus issue as above indicated.

As findings were waived and none were made, we must look to the allegations of the petitions and to the points made in petitioners' briefs in an effort to ascertain the theory upon which the trial court ordered the issuance of the writ. In their petitions, the attack was directed both at the act itself and at the proceedings had thereunder. The same attack is made in the briefs on file.

[1-4] With respect to the act, petitioners claim that said subdivision (c) relating to solicitation is unconstitutional. It is contended that (1) it is uncertain, vague, and indefinite as to the language and purpose; and (2) it is arbitrary and has no reasonable relation to the protection of public health, safety, or welfare. We find no merit in these contentions. We start with the settled rules that all presumptions are in favor of the constitutionality of the act; that all doubts are to be resolved in favor of and not against its validity; and that the conflict with the Constitution must be clear before it will be declared invalid. 5 Cal.Jur. 628, and cases cited. We find nothing uncertain, vague, or indefinite in the language or purpose of the act relating to the solicitation of human dead bodies. The main purpose of the act is expressed in the title, which reads, in part, "An act regulating funeral directors and embalmers and the transportation of and traffic in human dead bodies." It provides for the licensing of funeral directors and embalmers and for the suspension of such licenses when the licensee is found guilty of unprofessional conduct including the "solicitation of human dead bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs after death or while death is impending; providing that this shall not be deemed to prohibit general advertising." The purpose of this portion of the act is obvious and the language is sufficiently certain to carry out such purpose. It is not aimed at preventing general advertising, but it is aimed at preventing the direct solicitation of particular dead human bodies by overzealous funeral directors and embalmers in the conduct of their business. It covers the period while death is impending as well as the period after death. Any person of ordinary intelligence may readily ascertain the meaning of said provision, and there appears to be no difficulty in giving the language a reasonable and practical construction. As was said in County of Tulare v. City of Dinuba, 188 Cal. 664, at page 677, 206 P. 983, 988: "A statute cannot be held void for uncertainty, if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it." See, also, Pacific Coast Dairy v. Police Court, 214 Cal. 668, 8 P.(2d) 140, 80 A.L.R. 1217.

[5, 6] Nor do we find anything arbitrary about said provision of the act. On the contrary, it appears to be a reasonable regulation bearing definite relation to the public welfare. The business of both funeral directors and embalmers is subject to regulation under the police power and we are of the opinion that the Legislature acted within its province in providing for the protection of the public from the annoyance of direct solicitation of the bodies of their loved ones during the time of anxiety and sorrow. Prata Undertaking Co. v. State Bd. of E. & F. Directing, 55 R.I. 454, 182 A. 808, 104 A.L.R. 389. See, also, People v. Ringe, 197 N.Y. 143, 90 N.E. 451, 27 L.R.A.(N.S.) 528, 18 Ann.Cas. 474. State ex rel. Bigham v. State Board of Embalming, 297 Mo. 607, 250 S.W. 44.

[7, 8] Petitioners further contend that they "were not afforded due process either by law or by the board." The first portion of this contention constitutes a further attack upon the constitutionality of the act. But the act provides that a license may be suspended or revoked only "after proper

hearing and notice to the licensee." This was sufficient "for it is well settled that due process does not require any particular form or method of procedure. It is sufficient if reasonable notice and reasonable opportunity to be heard and to present any claim or defense are afforded; due regard being had to the nature of the proceedings and the character of rights which may be affected by it." Eley v. Gamble (C.C.A.) 75 F.(2d) 171, 173; see, also, Enterprise Irr. District v. Tri-State Land Co., 92 Neb. 121, 138 N.W. 171; Ramsay v. Shelton, 329 Ill. 432, 160 N.E. 769.

[9] The second portion of said contention relates to the actual proceedings before the board. It appears, however, that petitioner Drummey was personally served with notice and that petitioner Wilson had actual notice by receiving a copy thereof which was left at his place of business. These notices were received at a date which gave notice a reasonable time before the hearing was held and both petitioners actually appeared at the hearing. Both were given the opportunity to be heard and present any defense to the complaints. We are therefore of the opinion that the contention that they were not afforded due process by the board may not be sustained.

[10, 11] Further attacks are made by petitioners upon the proceedings before the board. They contend that the complaint in each instance did not state facts sufficient to show a violation of the act. This contention appears to be likewise without merit. Each complaint contained several counts and in each count it was alleged that the person charged did, on or about a specified date and at a specified place "solicit for preparation for burial and for burial the dead body of ——— (naming the person), the said ——— (naming the person) being then dead." Conceding the rule that proceedings before administrative boards are not ordinarily governed by technical rules of pleading and practice, petitioners nevertheless state that "it is required that the complaint be sufficient to fully advise on its face what the charge is." Assuming that petitioners correctly state the requirement, it appears that said requirement was met by the complaints here.

The only remaining contention of petitioners is that there was "no competent evidence to support action of board." In treating this contention, we will confine the discussion to the action of the board in suspending the embalmer's license of petitioner Drummey and in suspending the funeral director's license of petitioner Wilson, doing business under the name of Wilson & Kratzer. We do this for the reason that the parties are agreed that all of the acts alleged in all counts of the complaints, other than the so-called Shannon count, occurred before the provision in question was written into the act. It is further agreed that the Shannon count was not included in the complaint seeking the suspension of the embalmer's license of petitioner Wilson. It was therefore conceded by the board in the trial court and it is conceded here that "in so far as the embalmer's license of Aubrey Wilson is concerned, the charges against him may be deemed to be dismissed."

With respect to the last-mentioned contention, it may be noted that it is not claimed that the evidence was insufficient. The record contains ample evidence to show that petitioner Drummey was a licensed embalmer and was also the manager of petitioner Wilson, doing business as a licensed funeral director under the name of Wilson & Kratzer, and that at the time and place mentioned he did, following the death of Ada M. Shannon, solicit for preparation for burial and for burial her dead body. The gist of petitioners' contention is that there was no *competent* evidence to support the action of the board. It appears that the main evidence offered in support of the Shannon count was the record of a prior investigation held when no charges were pending against either of the petitioners. At that prior investigation, petitioner Drummey was present but petitioner Wilson was not present. Petitioner Drummey was sworn and testified at said prior investigation and gave a detailed account of his dealings with the relatives of Ada M. Shannon following her death. When the hearing was had upon the complaints in question, both petitioners were present. Witnesses were examined on all counts and both petitioners took the stand and testified. The record here shows that the first witness sworn was the shorthand reporter who had transcribed the record of the prior investigation. She identified the transcript of the proceedings on the prior investigation and it was read to the board and introduced in evidence as an exhibit without any objection by either of the petitioners. Neither petitioner Drummey nor petitioner Wilson raised any question as to its competency before the board and neither gave any testimony at the hearing which was in conflict with the testimony which had been given by petitioner Drummey on the prior investigation. In fact, the correctness of that testimony seems to have been tacitly conceded by petitioners, petitioner Wilson merely stating at the opening of the hearing, "There are extenuating circumstances, perhaps, that would also throw light on the question."

[12-16] In the absence of any objection before the board, it was too late to raise the question of the competency of said evidence on the application to the trial court for the writs which petitioners sought. The right of petitioners to raise the question of the competency of said evidence on said applications was certainly no broader than the right of an appellant to raise such questions on a direct appeal from a judgment. The rule on direct appeal is set forth in the recent case of People v. One Ford V. 8 Coach (Cal.App.) 69 P.(2d) 473, at page 474, where the court said: "It is well settled that in determining the question of the sufficiency of the evidence to sustain a trial court's decision, the appellate court will consider all proper evidence embraced in the record, including incompetent evidence admitted without objection; that the question of its competency is not before the court where it is admitted without objection, and that failure to object precludes the right subsequently to complain thereof (2 Cal.Jur. 804); furthermore, that incompetent evidence admitted without objection is legally sufficient to establish a fact (Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461–466, 168 P. 1037), and is likewise sufficient to support a finding based thereon. (Powers v. Board of Public Works, 216 Cal. 546–552, 15 P.(2d) 156)." As we are of the opinion that there was sufficient evidence to sustain the findings and judgment of the board suspending the embalmer's license of petitioner Drummey and the funeral director's license of petitioner Wilson, doing business as Wilson & Kratzer, and that the question of the competency of the evidence introduced without objection before the board could not be raised in the trial court on the application of petitioners for said writs, we conclude that the order for the issuance of the peremptory writ of mandamus directing the dismissal of said proceedings cannot be justified upon the ground stated in the last-mentioned contention. We are further of the opinion that, except as hereinafter noted, the order for the issuance thereof cannot be justified upon any other ground stated in the petitions or in the briefs of petitioners.

[17, 18] It appears, however, that we must still consider the propriety of the order for the issuance of the writ in its application to the dismissal of the proceedings on the complaint seeking the suspension or revocation of the embalmer's license of petitioner Wilson. For the reasons above set forth, the board conceded in the trial court and concedes here that said complaint "may be deemed to be dismissed." It nevertheless appeared to the trial court that there was an existing order of the board suspending said embalmer's license of petitioner Wilson. As there was admittedly no justification for said order of the board, it was a clear abuse of the board's discretion to enter said order. We are therefore of the opinion that petitioner Wilson was entitled to have said proceeding dismissed and that the portion of the trial court's judgment ordering that a writ of mandamus issue for that purpose must be affirmed. The propriety of invoking the writ of mandamus for such purpose was clearly indicated in Whitten v. California State Board of Optometry, supra, where the Supreme Court said at page 1297 of 65 P.(2d): "Under this theory the order of state-wide agencies such as the Board of Optometry would not be subject to review in response to the writ of certiorari, but their discretion could be confined within legal limits either by the procedure heretofore suggested or by the use of the writ of mandamus."

The appeal of petitioners is dismissed. The judgment of the trial court ordering a peremptory writ of mandamus to issue is affirmed in so far as it directs the dismissal of the proceedings seeking the suspension or revocation of the embalmer's license of petitioner Wilson and further directs the admission of said petitioner Wilson to the use and enjoyment of his said embalmer's license. In all other respects said judgment is reversed. The parties will bear their own costs on this appeal.

We concur: STURTEVANT, J.; GRAY, Justice pro tem.

22 Cal.App.2d 595

SANTOS v. DONDERO.

Civ. 5844.

District Court of Appeal, Third District, California.

Sept. 23, 1937.

Rehearing Denied Oct. 23, 1937.

Hearing Denied by Supreme Court Nov. 22, 1937.

1. Judgment ⚷648

Where judgment of justice's court forfeiting automobile, taken from owner by game warden, on owner's conviction for violation of game laws, was held to have exceeded jurisdiction of justice's court in subsequent action in claim and delivery brought by owner, that taking and holding was unlawful was settled and became law of the case in action for damages against game warden for withholding possession of automobile.

2. Game ⚷10

In action for damages against game warden for unlawfully withholding possession of automobile taken from owner and unlawfully forfeited to Fish and Game Commission on conviction of owner for violation of game law by justice court, game warden was proper party defendant, since original taking being unlawful, he could not escape liability for turning automobile over to commission as against contention that Fish and Game Commission was proper party defendant.

3. Damages ⚷139

In action against game warden for unlawfully withholding automobile, finding that reasonable value of use of automobile to owner was $1.25 per day or total of $663.75 for 531 days was not excessive.

◆

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Frank Santos against David Dondero. Judgment for the plaintiff, and defendant appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Ralph O. Marron and Emery F. Mitchell, Deputy Attys. Gen., for appellant.

Lovett K. Fraser, of Lakeport, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The Ford coupé here in question, possession of which had been taken by defendant herein when Santos, the plaintiff, had been arrested, was forfeited to the Fish and Game Commission by a judgment of the justice's court of the county of Lake. Thereafter an action in claim and delivery was filed and judgment adverse to Santos, plaintiff herein, was entered. Upon appeal this court in Santos v. Dondero, 11 Cal. App.(2d) 720, 54 P.(2d) 764, reversed the judgment, holding that the justice's court had exceeded its jurisdiction in forfeiting the automobile and that it remained the property of plaintiff. Upon this judgment becoming final, the Fish and Game Commission, who had received possession of the car through defendant herein, surrendered the coupé to plaintiff.

The present action was for damages for withholding the said automobile, and after a hearing the trial court found that plaintiff was deprived of the use of the coupé from September 29, 1934, to April 20, 1936, less some thirty days that plaintiff was confined to jail, and found that the reasonable value of the use to plaintiff for the 531 days was at the rate of $1.25 per day or a total sum of $663.75.

Appellant reargues that the game warden did not wrongfully take possession of the automobile nor did he unlawfully retain possession of the same, but that matter has been disposed of in the case of Santos v. Dondero, supra.

[1] From the evidence it appears defendant was a game warden and received information that some one had been engaged in the unlawful hunting of deer at night with a spotlight. On September 29th he went to a labor camp where plaintiff was employed, and after some investigation determined plaintiff was guilty of the charge and ordered plaintiff to get in the Ford coupé and accompany him to the office of the justice of the peace at Upper Lake. Plaintiff accompanied defendant to Upper Lake, where defendant took the keys of the car and thereafter retained them until at some later date he delivered them to the Fish and Game Commission. That this taking and holding was unlawful is now settled by Santos v. Dondero, supra, and it now becomes the law of the case.

[2] It is also claimed by appellant that the Fish and Game Commission is the proper party defendant in this action, but, the original taking by Dondero having been unlawful, he cannot escape liability by turning the car over to another.

[3] That being true, it leaves for consideration only whether or not the amoun

fixed by the court was reasonable. The trial court having taken evidence upon that matter and responsible witnesses having testified as to the reasonable value of the use of the car in sums greater than that found by the court, we cannot say that the amount as determined by the trial court was either excessive or unreasonable.

The judgment of the court is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

---

22 Cal.App.2d 532

PEOPLE v. HARVEY.

Cr. 423.

District Court of Appeal, Fourth District, California.

Sept. 15, 1937.

1. Criminal law 🔑1159(3)

In prosecution for kidnapping for purpose of extortion and robbery and of robbery, admissions of witnesses who identified defendant as the criminal that on different occasions they had inspected two individuals other than defendant, and had expressed an opinion that each of such persons bore a resemblance to man who had kidnapped them, created a conflict in evidence which was resolved against defendant by verdict of guilty.

2. Criminal law 🔑1160

The credibility of witnesses and the weight of evidence are exclusively for the trial court.

3. Kidnapping 🔑5
Robbery 🔑24(3)

In prosecution for kidnapping for purpose of extortion and robbery and for robbery, evidence *held* sufficient to identify defendant as the criminal.

4. Indictment and information 🔑171

A defendant in a criminal action may not be put on trial for any other offense than that of which he is accused by the information.

5. Witnesses 🔑337(5)

The questioning of a defendant, in a prosecution for kidnapping for purpose of extortion and robbery and for robbery, who had voluntarily offered himself as a witness, if he had ever been convicted of a felony, was proper (Code Civ.Proc. §§ 2051, 2065).

6. Criminal law 🔑1137(5)

A defendant who voluntarily offered information that he had formerly pleaded guilty to contributing to delinquency of a minor, a misdemeanor, in response to prosecuting attorney's inquiry as to whether defendant had ever been convicted of a felony, could not complain of admission of such evidence (Code Civ.Proc. §§ 2051, 2065).

7. Criminal law 🔑1044

Where no motion was made to strike voluntary statement of a defendant to effect that he had pleaded guilty to contributing to the delinquency of a minor, a misdemeanor, in response to inquiry of prosecuting attorney as to whether defendant had ever been convicted of a felony, and there was no request that jury be admonished to disregard statement, it was too late for defendant to complain of matter for first time on appeal.

8. Criminal law 🔑911

The denial of a defendant's motion for a new trial after verdict finding him guilty of kidnapping for purpose of extortion and robbery and of robbery was not error in absence of showing that trial court abused its discretion.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Charles Harvey was convicted of kidnapping for the purpose of extortion and robbery and of robbery, and he appeals.

Affirmed.

O. A. Thorpe, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Dep. Atty. Gen., for the People.

JENNINGS, Acting Presiding Justice.

The defendant in the above-entitled action was accused by an information containing four counts with the offenses of kidnapping for the purpose of extortion and robbery and of robbery. In counts 1, 2, and 4 the crime of kidnapping was charged and in count 3 the offense of robbery was alleged. On arraignment the defendant pleaded not guilty as to each offense and was subsequently tried before a jury which returned a verdict finding him guilty of each offense alleged in the information. Prior to rendition of judgment the defendant presented a motion for a new trial which was denied. From the judgment pronounced against him and from the order denying his motion for a new trial, the defendant appeals.

The points urged on this appeal are, first, insufficiency of the evidence to sustain the verdict; second, error committed by the trial court in admitting evidence which showed that the defendant had suffered a prior conviction of a felony; third, abuse of discretion by the trial court in denying defendant's motion for a new trial.

[1-3] With regard to the contention of evidentiary insufficiency the only respect in which it is urged that the evidence was insufficient relates to the matter of identification of the defendant. Examination of the transcript on appeal in its entirety demonstrates the futility of this contention. The three persons mentioned in the information as the victims of defendant's kidnapping operation testified during the trial and each of them positively identified the defendant as the individual who committed the offense on the date alleged in the information. It is true that on cross-examination two of these witnesses admitted that on different occasions they had inspected two individuals other than defendant and had expressed an opinion that each of such persons bore a resemblance to the man who had kidnapped them. Nevertheless, on direct examination, each of these two witnesses positively identified the defendant as the person who had committed the offense. Whatever discrepancies appeared in the testimony of these witnesses had no greater effect than to create a conflict in the evidence which was resolved against defendant by the jury. It is not the function of a reviewing court to pass upon the credibility of witnesses or the weight of the evidence. These matters are confided exclusively to the trial court. It may further be observed that the third victim in the kidnapping episode testified that she had not inspected any person suspected of the offense other than the defendant, and that, when she was asked if she could identify the perpetrator of the crime from a group of five men of approximately the same height and weight, she indicated the defendant. It is obvious that the contention of evidentiary insufficiency with respect to the fact of identification is entirely devoid of merit.

[4, 5] The contention that the court erred in receiving evidence which showed defendant's conviction of felony is likewise lacking in merit. The record shows that on cross-examination the defendant was asked if he had ever been convicted of a felony. Defendant's counsel thereupon offered to stipulate that he had been, but the court instructed defendant to answer the question. Thereupon, after some apparent evasiveness and without objection by his counsel, defendant admitted that he had been theretofore convicted of assault with intent to commit rape, a felony, in the superior court of San Diego county. Prior to making this admission the defendant had volunteered the information that he had once pleaded guilty to the offense of contributing to the delinquency of a minor. The only argument advanced by defendant with respect to the specification of error in admitting evidence relating to other crimes is that a defendant in a criminal action may not be put on trial for any offense other than that of which he is accused by the information. The correctness of this principle is obvious. Its applicability to the present situation is not, however, apparent.

Section 2051 of the Code of Civil Procedure defines the manner in which a witness may be impeached. It is there expressly declared that it may be shown either by the examination of the witness or by the record of the judgment that he had been convicted of a felony. Section 2065 of the Code of Civil Procedure declares that "a witness must answer as to the fact of his previous conviction for felony." When, therefore, a defendant in a criminal action offers himself as a witness, he may be asked, for the purposes of impeachment, if he has not been convicted of a felony. People v. Bauweraerts, 164 Cal. 696, 703, 130 P. 717; People v. Romer, 218 Cal. 449, 452, 23 P.(2d) 749. The record herein shows that this is precisely the course which was followed in the instant proceeding and the propriety of thus impeaching the defendant who had voluntarily offered himself as a witness is clear.

[6, 7] Apparently, the defendant also complains on this appeal that evidence which showed that he had formerly pleaded guilty to the offense of contributing to the delinquency of a minor, a misdemeanor, was erroneously received by the court. It is, however, manifest that he has no reasonable or proper cause for such complaint. The record indicates that he himself volunteered the information that he had entered

a plea of guilty to the aforementioned charge in response to the prosecutor's inquiry as to whether he had ever been convicted of a felony. The record further shows that no motion to strike the voluntary statement thus made and no request that the jury be admonished to disregard it was presented by the defendant. Under these circumstances it is too late for defendant to complain of the matter for the first time on appeal. People v. Ferello, 92 Cal.App. 683, 689, 268 P. 915; People v. Cohen, 113 Cal.App. 260, 263, 298 P. 114.

[8] As hereinabove stated, defendant's appeal is also from the court's order denying his motion for a new trial. There is no showing that the court abused its discretion in denying the motion and its order to that effect may not be disturbed.

The judgment and order from which this appeal has been taken are accordingly affirmed.

I concur: MARKS, J.

---

22 Cal.App.2d 597

NOLANDER v. KNUTSEN.

Civ. 5739.

District Court of Appeal, Third District, California.

Sept. 23, 1937.

1. Sales 🔑21

Purchaser of hammer mill consisting of specified items which were listed in schedule in order signed by purchaser who consented to the addition of three other items of machinery and consented also to additional price thereof, and thereafter received such additional machinery and made use thereof, could not claim a lack of consideration as means of avoiding liability on notes which were signed by purchaser to cover full purchase price of all equipment received, notwithstanding alleged belief that plan of hammer mill included the three additional items which had been furnished.

2. Contracts 🔑266(1)

Failure of consideration for an instrument may not be alleged where maker has received full consideration agreed upon, nor may a party defeat an action on ground of lack or failure of consideration, and retain any part thereof.

3. Appeal and error 🔑1177(6)

Where judgment was reversed but interest and attorney's fees were yet to be determined, cause was remanded for further hearing, rather than entry of judgment being directed as prayed for.

Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

Action by I. Nolander against K. Knutsen. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

Gilbert Moody, of Turlock, for appellant.

Harold L. Hjelm, of Turlock, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The complaint in this action is based upon three promissory notes of the principal sum of $203 each, bearing interest at the rate of 6 per cent. per annum. The defense to the action was lack of consideration. The defendant had judgment and the plaintiff appeals.

The plaintiff is the assignee of the Anglo-American Mill Company, of Owensboro, Ky. It appears that on or about May 29, 1930, the defendant contracted with the Anglo-American Mill Company, plaintiff's assignor, for the purchase of certain machinery, and, after paying certain sums of money therefor, executed eighteen promissory notes in the sum of $203 each, all of which were paid except the three notes upon which this action is based.

The record shows that an agent of the Mill Company by the name of Mohr obtained from the defendant an order for the purchase of a No. 3 super miracle ace hammer mill. The original order, of which we have just made mention, together with the equipment mentioned in the order, brought the contract price to the sum of $6,645.60. Upon the receipt of the order by the Mill Company it appears from the record that the company in looking over the order came to the conclusion that certain accessories should be included in the order, and wrote to the defendant as follows:

"July 2, 1930.

"Mr. K. Knutsen,
"Turlock, California.
"Dear Sir:

"In going over the plans we are preparing for you, checking them against your order, we find that your order does not include a magnetic separator for the Miracle Ace Hammer Mill, neither does it specify a variable speed drive for the chain drag feeder. Our Plan 4—G, from which the specifications of your mill were made by our Mr. Mohr, does not include these two very important accessories. Realizing that you are building an up to date plant, we feel that we should bring these matters to your attention. We have shown both of these accessories in our plans and feel quite sure that when we explain the necessity of them, that you will authorize us to include them with your shipment.

"Their addition to the order will make the total order read as follows:

Contract price for equipment specified on order	$6,645.60
Extra for 10 ton scale and dump	400.00
Extra for magnetic separator	150.00
Extra for Reeves variable speed drive	125.00
Total	$7,320.00

"This increases your order $675.00 and we can equal it up by placing the additional amount of your deferred payments, if you want us to do so. * * * We have written you quite at length on these subjects but we feel that it is better to plan and arrange these things now rather than have to make changes later. We are very anxious to get you started right and feel that that is what you want us to do.

"We will appreciate an expression from you on the changes that we have suggested. As we have said before we are proceeding with the building of your machinery according to the specifications that we have outlined, and if our suggestions do not meet with your approval we will thank you to take the matter up with us immediately. We are,

"Yours very truly,
"Anglo-American Mill Company,
"Chief Engineer."

Upon the receipt of this letter and wires which are not included in the transcript, the defendant wrote the following letter to the Mill Company:

"Turlock, Calif.,
"Aug. 19, 1930.

"Anglo-American Milling Co.
"Owensboro, Ky.
"Gentlemen:

"We have received your wires, your letter by airmail and a carload of machinery, the drafts and the notes. It is all here. * * *

"When I signed the contract for the machinery, Mr. Mohr was telling us that this was the complete machinery, and after receiving a letter from you to the effect that this was not complete, I was greatly surprised but I realize that a machine without a magnate is a dangerous thing so we had Mr. Mohr wire you to include this magnate and at the same time cancel the order for the corn cutter. * * *

"I want to thank you for the extension of time for the balance of payments and trust that everything will move on nicely so that we can meet the notes when they come due.

"We expect to hear from you again.

"Yours very truly,
"K. Knutsen."

On June 10, 1930, the Mill Company wrote to the defendant in relation to the scales included in the order advising the defendant that a 5-ton scale was not of sufficient capacity to accommodate heavy trucks, and that a 10-ton scale should be ordered if heavy trucks were to be accommodated, and that the cost of this 10-ton scale would be $400 in addition to the cost of a 5-ton scale. In relation to this, defendant testified as follows: "Anglo-American Milling Company has a representative by the name of Mohr, and he was the one that made this contract, and he put in all the machinery, including the scale. When the Anglo-American Milling Company received this contract and looked it over, they claimed that the scale was too small; that Mr. Mohr had included in the deal, and they asked me if they might ship me a larger scale and add $400.00 and I said it was all right."

The record shows that the scales were never used by the defendant, and the reasons therefor are set forth in the following excerpt from his testimony:

"Q. If you received the shipment in the latter part of August, 1930, when did you have the machinery set up? A. I had two mechanics to start as soon as the car was unloaded and they worked there three months and a half to complete the mill.

"Q. And when did it first begin to operate? A. Last part of December.

"Q. In 1930? A. Yes.

"Q. And when did you discover that you were dissatisfied with the scale? A. In April, 1933.

"Q. Was the scale operated between December, 1930, and April, 1933? A. No, the scale has not been set up.

"Q. Was the scale not set up until April, 1933? A. The scale was not set up at my place.

"Q. What did you do with it? A. I traded it. I couldn't use it.

"Q. To whom did you dispose of it? A. To Fairbanks Morse Co. of San Francisco.

"Q. Did you receive something for it? A. Received $300.00.

"Q. When was it that you disposed of it? A. In July, 1933.

"Q. Did you ever operate the scales? A. No.

"Q. When you set up your mill, why did you not set up your scales? A. The scale was not necessary for the operation of the mill, as it was outside the building.

"Q. Did it remain in its case until April, 1933? A. Yes.

"Q. You never had any communication or discussion with the Anglo-American Mill Co. about this scale until after April, 1933? A. No.

"Q. Did you ever operate the scale? A. No. * * *

"Q. You didn't need these scales then? A. The depression came in and so we didn't complete that part of it.

"Q. Would it require other expenditures to install the scales, is that it? A. Yes.

"Q. And for that reason you didn't have them installed? A. Yes.

"Q. And then when you traded them off to Fairbanks Morse Co., you didn't get any scales from them either? A. No.

"Q. You just got a certain amount of money? A. Yes."

There is some argument in the briefs presented about a 15-ton scale, but there is nothing in the record showing that any such scale was mentioned in any orders or any of the letters written by the Milling Company, and that the corrected order was for a 10-ton scale, and not for a 15-ton scale. The testimony shows that the defendant received a 10-ton scale, and that it was not on account of any defect in these scales that the same were not used, but on account of financial difficulty.

The alleged failure of consideration set up in the answer is based upon the idea that plan 4—G miracle mill included a magnetic separator and a Reeves variable speed drive, the magnetic separator being listed at a cost price of $150 and the Reeves variable speed drive at $125. However, this contention is completely answered by the Defendant's Exhibit 2, which sets forth, under the heading of Schedule A, all the items included in plan 4—G, as follows:

"*Quantity*

Price

This plan 4—G consists of the following items:

1. No. 3 Super Miracle Ace Hammer Mill 50 H.P. direct connected motor and drag chain feeder, also collector and piping;
1. 2000 lb. Anglo-Geyser Batch Mixer with hopper scales and ground feed-bin over Molasses Agitator, 7½ H.P. motor;
1. No. 2 Miracle Molasses Process with direct connected motors and percentage feeder for governing the flow of mixed feed into Molasses Mixer;
1. Self-contained Rotary Corn-cutter, cleaner and grader, 7½ H.P. Motor;
1. Wagon and truck dump;
1. No. 24 Fox Hay Cutter.

Voltage 220;
Cycles 60;
Phase 3."

Thus, in plain words, all of the items of machinery and their uses are made plain and distinct, and constituted the order executed by the defendant.

In connection with the scales we quote the testimony of the defendant further:

"Q. Well, will you tell us what did occur with regard to that scale? A. When the contract was signed and it got back to Kentucky, they claimed that that scale that Mohr had put it was too small, and they advised me that I should put in a bigger scale. Of course a 5-ton scale is an awfully small scale. I don't know who manufactures a 5-ton scale at this time, but I took it for granted that Mr. Mohr didn't know what scale or what price, and when the office found out he only put in $250.00 for allowance of the scale, they find (found) that was too cheap, and in order to make the deal go through they advised me that I should put in a larger scale, and charged me $400.00 for it.

"Q. They advised you to take a ten-ton scale, isn't that true? A. Yes."

It appears from the foregoing that the defendant was fully advised as to the three items which were mentioned by the company in their letter, before proceeding to execute the order, and that the company received from the defendant his consent that the three items should be added to the order already sent in, and at the price mentioned by the company.

The record further shows that the defendant received all three of the items mentioned, and that, outside of the scales, the other two items were used by him for three years without making any complaint whatever. His testimony, on the contrary, is that the mill and all the machinery equipment worked satisfactorily. That the magnetic separator and the Reeves variable speed drive did constitute valuable accessories and added to the value of the equipment is beyond question. It appears from the record that the magnetic separator would not be an absolute necessity as an accessory, but is a valuable safeguard to prevent any pieces of metal going into the mill and thus injuring some portion of the machinery.

The record shows that all the machinery which we have mentioned, and the letters to which we have referred herein, and the information as to the increased price was before the defendant at the time the eighteen notes were executed. It may be here noted that none of the three notes sued upon were specially executed for the price of the three articles of machinery which we have mentioned. The full consideration appears to have been received without any question as to the price thereof or as to any misunderstanding in relation to the added accessories at an added price until just preceding the institution of this action.

There is nothing in the record indicating that plan 4—G of miracle mill included anything different from that which is scheduled in the order signed by the defendant. There is no testimony by any one that plan 4—G contained anything additional to that specified in the order, nor is there anything in the record indicating that the order was signed, and that the defendant agreed to the inclusion of the added accessories on account of any misrepresentation, fraud or inducement of any kind.

[1] Having advised the Mill Company to include the three items mentioned, having received the same and made use thereof, it is not conceivable how there could be any failure of consideration. That the defendant might have thought that plan 4—G included the extra items is wholly immaterial, as shown by the fact that he signed an order containing a schedule which particularly mentioned everything contained in plan 4—G, and afterwards consented to the addition of the machinery mentioned, and also to the additional price thereof. We think this clearly shows that a finding of the court that there is a failure of consideration is not only without support in the testimony, but is directly contrary thereto.

[2] The language found in 19 California Jurisprudence p. 1004, appears to us to be applicable here, to wit: "It is clear that there may be no contention that the consideration for an instrument has failed where the maker has received the full consideration, which was agreed upon, and a defendant may not defeat the action on the ground of lack or failure of consideration, and retain any part thereof." To the same effect is Continental National Bank v. Doyle, 55 Cal.App. 405, 203 P. 780.

[3] The appellant asks that the judgment be reversed and also that the trial court be required to enter judgment for the plaintiff as prayed for. However, as the cause must go back for the calculation of interest and the determination of attorneys' fees, the trial court should experience no difficulty in ascertaining and entering the correct judgment. Therefore, the judgment entered herein should simply be reversed and the cause sent back for further hearing.

And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

22 Cal.App.2d 551

SMITH v. IBOS.

Civ. 10440.

District Court of Appeal, First District, Division 2, California.

Sept. 17, 1937.

1. New trial 🔑109

The right to move for new trial is statutory and does not exist as against party insisting on strict compliance with statutes, unless procedure prescribed thereby is followed (Code Civ.Proc. § 656 et seq.).

2. New trial 🔑109

The Code sections prescribing procedure to obtain new trial must be strictly construed (Code Civ.Proc. § 656 et seq.).

3. New trial 🔑136

A notice of intention to move for new trial is essential to court's jurisdiction to entertain motion (Code Civ.Proc. § 659).

4. New trial 🔑137

The statutory requirements that notice of intention to move for new trial designate both grounds thereof, and whether it will be made on affidavits, court's minutes, or both, are mandatory (Code Civ.Proc. § 659).

5. New trial 🔑137

A notice of intention to move for new trial was fatally defective in failing to designate whether motion would be made on affidavits, court's minutes, or both, and hence did not confer jurisdiction on court to entertain motion (Code Civ.Proc. § 659).

6. New trial 🔑152

The service and filing of corrected notice of intention to move for new trial after expiration of time allowed by statute could not cure substantive defect in original notice failing to designate whether motion would be made on affidavits, court's minutes, or both (Code Civ.Proc. § 659).

7. New trial 🔑137

The statutory requirement that notice of intention to move for new trial designate whether motion will be made on affidavits, court's minutes, or both, cannot be ignored as superfluous and of no practical benefit to opposing party because motion on grounds specified in notice can be made only on minutes (Code Civ.Proc. § 658, as amended by St.1915, p. 201; § 659).

8. Statutes 🔑206

A court cannot give statute such construction as will omit portion thereof (Code Civ.Proc. § 1858).

9. New trial 🔑109

The Legislature's power in specifying procedural steps for new trials is exclusive and unlimited (Code Civ.Proc. § 656 et seq.).

10. Constitutional law 🔑70(3)

The wisdom of or necessity for statutory requirements is for legislative, not judicial, consideration, and judiciary may not usurp legislative function by substituting its own ideas for those expressed by Legislature in interpreting statutes.

11. New trial 🔑152

Plaintiff was not entitled to amend his notice of intention to move for new trial by designating whether motion would be made on affidavits, court's minutes, or both, after expiration of statutory time limit; original notice omitting such designation being fatally defective (Code Civ.Proc. § 659).

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Charles Smith against P. J. Ibos, who filed a cross-complaint. Judgment for defendant, and, from an order granting plaintiff a new trial, defendant appeals.

Reversed, with instructions.

Russell P. Tyler, of San Francisco, for appellant.

Benjamin Margolis, of San Francisco, for respondent.

GRAY, Justice pro tem.

The trial before the jury resulted in a judgment in favor of appellant and against respondent. Thereafter appellant notified respondent of the entry of judgment and respondent served and filed notice of his intention to move for a new trial. This notice designated the grounds of the future motion as, (1) insufficiency of the evidence to justify the verdict and that the verdict was against law, and (2) error in law occurring at the trial and excepted to by the respondent, but failed to designate whether the motion would be made upon affidavits or the minutes of the court or both. In due course, respondent made a motion for a new trial to the consideration of which appellant objected upon the ground that the notice was insufficient to confer jurisdiction on the court to entertain the motion, since the notice by reason of its omission did not meet the requirements of section 659 of the Code of Civil Procedure. While the motion was under submission and on the twenty-fifth day after service of notice of entry of judgment, respondent served and filed a corrected notice of his intention to move for a new trial, which contained the designation previously omitted. Subsequently the court made its order granting a new trial from which the present appeal is taken. In support thereof, appellant reiterates his claim that the original notice was insufficient and that the corrected notice came too late to supply the former's deficiency.

[1-6] The right to move for a new trial is statutory and unless the procedure prescribed by sections 656 and following of the Code of Civil Procedure is followed, the right does not exist as against a party who insists upon strict compliance with those sections. Simpson v. Budd, 91 Cal. 488, 27 P. 758; Burton v. Todd, 68 Cal. 485, 9 P. 663; California Imp. Co. v. Baroteau, 116 Cal. 136, 47 P. 1018. These sections must be strictly construed in order that litigants may not lose their rights in the confusion which would arise from their uncertain interpretation. Prothero v. Superior Court, 196 Cal. 439, 238 P. 357; Middleton v. Finney, 214 Cal. 523, 6 P.(2d) 938. A notice of intention is essential to the court's jurisdiction to entertain the motion. Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446. The requirements of section 659 that the notice designate both the grounds upon which the motion will be made and whether it will be made upon affidavits or the minutes or both are mandatory. Breeze v. Southern Petro T. L. Co., 5 Cal. App.(2d) 507, 43 P.(2d) 584. The original notice was fatally defective in its failure to designate whether the motion would be made on affidavits or the minutes or both and therefore did not confer jurisdiction upon the court to entertain the motion subsequently made. Hill v. Beatty, 61 Cal. 292; Hughes v. Alsip, 112 Cal. 587, 44 P. 1027; Melvin v. Carl, 206 Cal. 772, 276 P. 574. The service and filing of the corrected notice of intention after the expiration of the ten days allowed by section 659 could not cure such defect in substance so as to allow the court to entertain the motion. Little v. Jacks, 67 Cal. 165, 7 P. 449; Cooney v. Furlong, 66 Cal. 520, 6 P. 388; Parker v. Doray, 98 Cal. 315, 33 P. 118; Union Collection Co. v. Oliver, 162 Cal. 755, 124 P. 435; Strange v. Strange, 23 Cal.App. 281, 137 P. 1104.

[7-11] To escape from these conclusions, respondent argues that, since, under section 658, as amended in 1915 (St.1915, p. 201), a motion upon the grounds specified in his notice could only be made upon the minutes, the designation of such grounds as effectually advised appellant that the motion would be made upon the minutes as an express statement thereof would have done. For that reason, he further argues, the requirement of section 659 as to the designation of whether the motion will be made upon affidavits or minutes or both may be ignored as superfluous and of no practical benefit to his opponent. The argument, in effect, seeks, under the guise of judicial construction, the elimination, as unnecessary, of an express requirement of the section. But a court is prohibited from such a construction as will omit a portion of a statute. Code Civ.Proc. § 1858. The power of the Legislature in specifying procedural steps for new trials is exclusive and unlimited. Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; Bates v. Ransome-Crummey Co., 42 Cal.App. 699, 184 P. 39. The wisdom of or necessity for certain requirements are matters for legislative and not judicial consideration and the judiciary, in its interpretation of legislative enactments may not usurp the legislative function by substituting its own ideas for those expressed by the Legislature. 23 Cal. Jur. 727. The retention of the questioned requirement in the simultaneous amendments to both sections indicates that the Legislature considered such requirement of practical value to litigants. Equally untenable is his further argument that he was entitled to amend his notice of intention after the expiration of the statutory time limit, because it erroneously assumes that the original notice was not fatally defective.

The order granting a new trial is reversed, with instructions either to deny the motion for a new trial or dismiss the proceedings. Melvin v. Carl, supra.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

22 Cal.App.2d 543

REICHLE v. HAZIE et al.

Civ. 2029.

District Court of Appeal, Fourth District, California.

Sept. 16, 1937.

Hearing Denied by Supreme Court Nov. 15, 1937.

1. Automobiles 🔑245(72)

Whether a pedestrian who, before entering a street, looks for approaching automobiles and fails to see one that injures him, has been contributorily negligent, is generally for the jury.

2. Appeal and error 🔑999(3)

The jury's finding as to contributory negligence of pedestrian who, before entering a street, looks for approaching vehicles and fails to see one that injures him, will ordinarily not be disturbed on appeal.

3. Negligence 🔑136(26)

Whether a given state of facts constitutes contributory negligence as a matter of law, or whether it should go to the jury, depends entirely upon the existing circumstances in each particular case.

4. Automobiles 🔑245(72)

Where pedestrian, who is injured by an automobile, fails to look or looks straight ahead without glancing to either side, or is in a position where he cannot see, or where he takes no precaution for his own safety, the question of his contributory negligence is for the court.

5. Automobiles 🔑245(72)

Where pedestrian or one standing on highway, who is injured by an automobile, looks but does not see approaching vehicle or, seeing one, erroneously misjudges its speed or distance, or for some reason assumes he could avoid injury to himself, the question of his contributory negligence is for the jury.

6. Appeal and error 🔑999(3)

Finding implied from jury's verdict for pedestrian that pedestrian, who was struck by automobile at street intersection, although he had looked in all directions for approaching vehicles, was not contributorily negligent, could not be disturbed on appeal.

7. Automobiles 🔑246(50)

Photographs of three corners of intersection at which pedestrian was struck by automobile, conclusively showing that intersection was an obstructed one, justified instruction on subject of obstructed intersections, notwithstanding absence of oral testimony to establish that intersection was obstructed as defined in Vehicle Code (St.1935, pp. 176, 177, §§ 510, 511(a)(4), 513).

8. Stipulations 🔑18(7)

Stipulation during trial that intersection at which pedestrian was struck by automobile was within a business district was conclusive on that question, and obviated necessity of introducing any evidence as to the character of the district.

9. Appeal and error 🔑176

The effect of stipulation, during trial, that intersection at which pedestrian was struck by automobile was within a business district, could not be questioned on appeal.

10. Stipulations 🔑14(10)

It having been stipulated that intersection where pedestrian was struck by automobile was within a business district, instruction that permissive or prima facie speed limit was 30 miles an hour was not warranted under statute (St.1935, pp. 176, 177, §§ 510, 511(a)(4), 513).

11. Damages 🔑132(6)

$8,500 damages for serious and permanent injuries which required 110 days in a hospital and would require return for another operation, upon which the extent of the use of one of plaintiff's legs depended, was not excessive.

12. Hospitals 🔑5

Where a patient in a county hospital can pay the charges for his care and treatment, it becomes the duty of the county officials to collect such charges from him.

13. Hospitals 🔑5

Where a patient is admitted to a hospital without an express contract to pay for his care, in the absence of evidence to show gratuitous service, the law implies an agreement to pay the reasonable value of the services rendered, subject to limitations applicable when hospital is a county institution.

14. Damages 🔑43

Injured plaintiff was not precluded from recovery of special damages because he was cared for in a public hospital, where such recovery would have been sustained had he been cared for and treated in a private hospital.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by John Reichle against Elmer B. Hazie, Jack Storey, a corporation, and others. Judgment for plaintiff against the named defendant, and the named defendant appeals.

Affirmed.

George A. Work, of San Francisco, for appellant.

Hervey & Holt, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment against Jack Storey, a corporation, to which we will refer as the defendant, in the sum of $8,500 general and $1,033 special damages, for injuries suffered by plaintiff in an automobile accident on May 30, 1936, at the corner of Second avenue and Market street in San Diego.

Market street and Second avenue are public streets of the city of San Diego. Market street runs east and west, and Second avenue intersects it at right angles. Plaintiff, a pedestrian, was crossing from the north to the south side of Market street in a pedestrian crosswalk on the west side of Second avenue. An automobile belonging to defendant and operated by Lee G. Camp, its employee, was being driven north on Second avenue. Camp made a left turn into Market street and ran plaintiff down, injuring him seriously and permanently.

Defendant urges the following grounds for a reversal of the judgment: (1) That plaintiff was guilty of contributory negligence as a matter of law; (2) errors in instructions given; (3) that the general damages are excessive; and (4) that no special damages are recoverable.

Plaintiff testified that before entering the intersection he looked for approaching vehicles in both directions on Market street and back of him (north) on Second avenue. He also testified that he looked in all directions for approaching vehicles and did not see defendant's automobile until it hit him.

[1-5] It is too well settled in California to need extensive citation of supporting authorities that when a pedestrian, before entering a street, looks for approaching vehicles and fails to see one that injures him, the question of his contributory negligence is generally one of fact for the jury; that the finding of that body on this question ordinarily will not be disturbed on appeal. In White v. Davis, 103 Cal.App. 531, 284 P. 1086, 1091, it is said: "The question as to whether a given state of facts constitutes contributory negligence, as a matter of law, or whether it is a matter that should go to the jury, as a question of fact, is often a close one. The solution depends entirely upon the existing circumstances in each particular case. Unusual circumstances may determine in a given case whether or not reasonable minds might legitimately draw different conclusions on the question of negligence. There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

[6] Under the circumstances of the instant case, the jury having absolved plaintiff from contributory negligence, its implied finding on that question cannot be disturbed here.

[7] The trial court in its instructions gave the jury a fair summary of sections 510 and 513 and the appropriate provisions of section 511 of the California Vehicle Code (St.1935, pp. 176, 177), except as to the thirty-mile per hour permissive speed at certain intersections. Defendant complains of these instructions upon the ground that there is no evidence (1) that the intersection was obstructed; or (2) that it was within a business district; and (3) that the permissive speed at the intersection was thirty miles per hour under the provisions of the latter part of subsection four of subdivision "a" of section 511 of the Vehicle Code (St.1935, p. 176).

It is true that there is no oral testimony in the record which would conclusively establish that the intersection was obstructed as that term is defined in the Vehicle

Code. However, there are in the record photographs of three corners of the intersection which conclusively establish the fact that it was an obstructed one. These photographs are in evidence and justify the instruction given on that subject.

[8, 9] During the trial it was stipulated that the intersection was within a business district. This stipulation is conclusive on that question and obviated the necessity of introducing any evidence as to the character of the district. The effect of the stipulation cannot be questioned on appeal.

There is no evidence that there were boulevard stop signs on any corner of the intersection. None show in the photographs of three of the four corners.

[10] Under the plain provisions of subsection 4, subdivision "a" of section 511 of the Vehicle Code, it having been stipulated that the intersection was within a business district, the permissive or prima facie speed limit was not thirty miles an hour. There is nothing in the record that would render proper an instruction on any thirty miles per hour permissive or prima facie speed at the intersection.

[11] There is no merit in the contention that the general damages awarded plaintiff are excessive. He was seriously and permanently injured. He spent one hundred ten days in a hospital and will have to return for another operation. He is permanently lamed. The success or failure of the future operation will determine the extent of the use of one of his legs. He has osteomyelitis of one of the bones of his leg and permanent draining is not an improbable result. A reading of the description of plaintiff's injuries set forth in defendant's opening brief is sufficient to convince us that the size of the award of general damages is not such as to indicate corruption, bias, passion, or prejudice on the part of the jury.

[12-14] Defendant attacks the award of special damages because plaintiff was cared for in a county hospital and not a private institution. The contention is based upon the following excerpt from the record concerning charges made at the county hospital: "There are two types of patients on whom a charge is supposed to be made. First, any patient who is admitted fraudulently to the hospital and is able to pay his bill; and, second, in any case where there is recompense for the injury received, he is supposed to pay the same fees as to any private hospital, not only to the doctor but to the hospital."

Defendant does not question the reasonableness of the charges which form the total of the special damages.

Where a patient in a county hospital can pay the charges for his care and treatment, it becomes the duty of the county officials to collect such charges from him. Goodall v. Brite, 11 Cal.App.(2d) 540, 54 P.(2d) 510. Where, as here, a patient was admitted to a hospital without an express contract to pay for his care and treatment, "The law, * * * in the absence of evidence to show gratuitous service, would imply an agreement * * * to pay the reasonable value" of the services rendered (Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 P. 713, 715), subject to the limitations set forth in Goodall v. Brite, supra, when the hospital is a county institution. While this question seems to be one of first impression in California, we can see no good reason for denying the recovery of special damages where plaintiff was cared for in a public hospital when such recovery would be sustained had he been cared for and treated in a private hospital. Certainly there is just as sound reason in permitting such recovery where the money will go to a public institution to relieve the burden of public taxes as where it will go to a private institution to increase the profits of its stockholders.

Judgment affirmed.

I concur: JENNINGS, Acting P. J.

22 Cal.App.2d 555

In re GARRETT'S ESTATE.

GARRETT v. LANNAN.

Civ. S. C. 57.

District Court of Appeal, Second District, Division 1, California.

Sept. 20, 1937.

Hearing Denied by Supreme Court Nov. 18, 1937.

1. Garnishment ⟹61

Fees of an administrator of a decedent's estate were subject to attachment at instance of creditor of administrator after administrator's final account had been "settled" by minute order and before distribution of estate had been ordered, as against contention that after administrator's account had been "settled" no further order of distribution was necessary in order to invest administrator with authority to withdraw assets from the estate.

2. Executors and administrators ⟹501

An administrator of a decedent's estate could not complain of order of distribution which provided that fees due administrator and attached by administrator's creditor should be held by sheriff in trust until a proper determination of rights of the respective parties could be adjudged by "a court of competent jurisdiction," except possibly the authority of court to impound the fees, since order did not determine rights of parties.

◆

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Proceeding in the matter of the estate of David Thomas Garrett, deceased, wherein J. E. Lannan, an alleged creditor of Wilson T. Garrett, administrator of the estate of David Thomas Garrett, deceased, caused a writ of garnishment or attachment to be served with respect to the fees which had been allowed to the administrator. From the order of distribution, the administrator appeals.

Motion to dismiss appeal denied. Judgment affirmed.

Joseph M. Maltby, of Long Beach, for appellant.

George I. Devor, of Los Angeles, and J. F. Goux, of Santa Barbara, for respondent.

HOUSER, Presiding Justice.

From the record herein it appears that Wilson T. Garrett was the administrator of the estate of David Thomas Garrett, deceased, and that as such administrator he filed his final account for settlement thereof and at the same time prayed for distribution of the estate. On the hearing of such petition, by minute order the account was ordered "settled"; but the matter of distribution of the estate was postponed for determination for a considerable period thereafter. Before distribution of the estate was ordered, respondent herein, who was a creditor of the administrator, caused a writ of garnishment or attachment to issue and to be duly served with respect to the fees which had been allowed to the administrator, in pursuance of which, in ordering distribution of the estate, the probate court in effect directed that the administrator's fees be paid by him to the sheriff of the county, "subject to the rights of the aforementioned attaching creditor and said Wilson T. Garrett therein and thereto, and said attaching creditor, J. E. Lannan, and said Wilson T. Garrett, said Administrator, will be hereby ordered and remitted to whichsoever Court may be a Court of competent jurisdiction in this matter for a determination therein and thereby of their respective rights and priorities in and to the said fees. * * * It is further ordered that any and all fees payable or to be paid to Wilson T. Garrett as Administrator of and in the above entitled Estate shall be, and the same are hereby ordered, paid to the Sheriff of San Bernardino County, California, the officer attaching the same as aforementioned, subject to the rights of the aforementioned attaching creditor and said Wilson T. Garrett therein and thereto, and said attaching creditor, J. E. Lannan, and said Wilson T. Garrett, said Administrator, are hereby ordered and remitted to whichsoever Court may be a Court of competent jurisdiction in this matter for a determination therein and thereby of their respective rights and priorities in and to the said fees."

It is from such part of the order of distribution that the administrator, as such, has appealed to this court.

[1] As this court understands appellant, his ultimate contention is that at the instant when, by order made by the probate court and entered in the minute book thereof, his final account was "settled," his right of ownership to the amount that was stated in his account as being due to him on account of services that theretofore had been rendered by him as administrator was thereby

fixed and determined; and that thereafter, in order to invest him with authority to withdraw from the assets of the estate and appropriate to his own use the amount thus "settled," no further order by the probate court of distribution of the estate, which order might or should include a direction to him to pay to himself the amount thus determined, was at all necessary. To that end and as a foundation for his said contention appellant has presented authorities to the effect that: "Administrator's fees are an expense of administration and belong in the account. Estate of Magorty, 169 Cal. 163, 146 P. 430. The account and petition for distribution are distinct and separate items, and the account can be settled and distribution postponed. Estate of Thayer, 1 Cal.App. 104, 81 P. 658. A minute order is sufficient for the settlement of an account, and it is not necessary that a formal written order be made on the date of hearing. Estate of Sanderson, 74 Cal. 199, at page 216, 15 P. 753."

However, appellant cites no authority, nor does he favor this court with any argument that would sustain his bare statement to the effect that when an administrator's account has been "settled" no direct order by the court is necessary to at once divest the estate of, and to invest the administrator with, the amount fixed in the account as fees that may have been earned by the administrator acting as such. But, without deciding that question, even though it be conceded that the minute order by which the account was "settled" was sufficient in itself, and that without any other order of the court the administrator thereupon had authority to pay to himself in his individual capacity fees which thus had been "allowed" to him, still the record fails to reveal the fact that he ever did any such thing. As far as thus appears, the amount of such fees remained intact in the assets of the estate and was held by the administrator in his official capacity as such an asset. In principle, the situation in that regard did not differ from that which might exist between an employer and an employee, the latter of whom has performed services, but whose compensation has not been paid. Nor in effect is any difference discernible between the facts in the instant matter and a situation wherein it might appear that a corporation had declared a dividend on its outstanding stock but had not paid such dividend to one of its stockholders. In the one case the employee has earned his salary but it remains in the possession of his employer; and in the other, although not actually paid to the stockholder, ordinarily he has an unqualified right to the amount of the declared dividend. In the absence of statutory exemption from execution, it would seem unlikely that any legal reason would prevent a creditor of the employee from levying upon the salary that was due to the employee; or, in the other case, that would preclude a creditor of the stockholder from attaching the amount of the dividend that was due to the stockholder.

[2] But in the instant matter, aside from what may be the law with reference to the ultimate rights of the interested parties, an examination of that part of the order from which the appeal is taken reveals the fact that other than a direction by the probate court by which the amount of the fees of the administrator was ordered to be impounded, no order was made with respect to a determination of the question that is here presented. As hereinbefore has been indicated, all that was ordered by the probate court in effect was that the fees should be held by the sheriff in trust until a proper determination of the rights of the respective parties could be adjudged by "a court of competent jurisdiction." Consequently, other than a possible objection on the part of the administrator that the probate court had exceeded its authority in directing that his fees be impounded (of which direction no criticism is made), the order contained nothing of which he had a legal right to complain. Apparently the prevailing question in the mind of the judge of the probate court was whether the probate court, as such, had jurisdiction of the legal question that was presented to it for determination, which question, as appears from the order, was reserved for future consideration.

The motion to dismiss the appeal is denied without prejudice. The order or "judgment" is affirmed.

We concur: YORK, J.; DORAN, J.

22 Cal.App.2d 529

BALMER v. CITY OF BEVERLY HILLS.

Civ. 11499.

District Court of Appeal, Second District, Division 2, California.
Sept. 15, 1937.

Municipal corporations ⚷791(2)

A city was not liable to pedestrian for injuries occasioned when pedestrian tripped and fell upon sidewalk, in absence of notice of alleged defect in sidewalk, where only defect was that surface of new sidewalk was approximately one inch higher at one point than surface of older adjacent sidewalk and such defect had existed for six or seven years.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Emma Balmer against the City of Beverly Hills. From a judgment for plaintiff, defendant appeals.

Reversed.

Richard C. Waltz, City Atty., and C. Richard Maddox, Asst. City Atty., both of Beverly Hills, for appellant.

Mark F. Jones and W. L. Engelhardt, both of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff obtained a judgment against defendant municipality for damages occasioned when she tripped and fell upon a defective sidewalk in the City of Beverly Hills. The sidewalk in question is in front of a theater building and the parking lot adjacent to it. About ten years before the accident a new sidewalk had been constructed in front of the parking lot in accordance with the provisions of the Improvement Act of 1911 (St. 1911, p. 730, as amended). The sidewalk is approximately fourteen feet wide from curb to property line in front of the Fox Wilshire theater building and the adjoining parking lot. Of this width approximately five or six feet adjacent to the property line of the parking lot is old sidewalk, apparently installed when the property was originally subdivided and sold to the public. The balance of the width of sidewalk in front of the parking lot between the old sidewalk and the curb was put in under the Improvement Act of 1911 by a private contractor under contract with the Beverly Hills city engineer and street superintendent and was accepted by the defendant city. All of the sidewalk in front of the theater building was apparently installed at the time the building was built, some six or seven years prior to the accident referred to in this action, and the dividing line between this portion of sidewalk and the portion in front of the parking lot is three inches easterly of the property line between the theater building and the parking lot extended. The surface of the new sidewalk in front of the theater building where it joins the old original sidewalk in front of the parking lot is even with the surface of the old original sidewalk adjacent to the building, but it is not to exceed one inch higher at the outside corner of the old original sidewalk approximately six feet from the building. The surface of the new sidewalk in front of the theater building is flush and level with the surface of the new sidewalk installed under the Improvement Act in front of the parking lot, but the surface of the new sidewalk installed under the Improvement Act is approximately one inch higher than the surface of the corner of the old original sidewalk where it joins the new sidewalk in front of the theater building. This difference in level between the surface of the old original sidewalk, which is lower at its northwesterly corner, and the surface of the new sidewalk installed under the Improvement Act decreases to a point approximately six or eight feet easterly, where the two surfaces are again exactly level. In other words, the northwesterly corner of the portion of the old original sidewalk in front of the parking lot is depressed below the surface of both the new sidewalk in front of the theater building and the new sidewalk installed under the Improvement Act. The condition just described had existed for a number of years, apparently since the construction of the new sidewalk. No notice, either oral or written, was given to the defendant city or any of its representatives concerning the alleged dangerous condition of the sidewalk.

In its closing brief appellant has called our attention to the recent decision of the Supreme Court in Whiting v. City of National City (Cal.Sup.) 69 P.(2d) 990, 991, a case in which the facts bear a striking similarity to the facts of the case now before us. In that case the trial court found that the sidewalk was constructed of contiguous cement squares with expansion joints between them; that the square upon which the plaintiff tripped was raised at its easterly edge above the square next adjoining it on the east; that at the highest point of such rise it was about three-quarters of an inch above the surface of the adjoining square and that the rise extended for several feet to the north, gradually lessening in height until the surface was approximately level; that this condition had remained unchanged about six years prior to the time when the plaintiff tripped upon it; that it constituted an unsafe and defective condition in the sidewalk; that prior to the accident under review three people had stumbled and fallen over the defective area; and the mayor and several members of the city council and the street commissioner of the city had walked frequently over the portion of the sidewalk in question. The case was tried without a jury and the judge made a personal inspection of the premises. In reversing a judgment in favor of the plaintiff the Supreme Court held that the constructive notice necessary to fasten liability on the city under the statute must be constructive notice not only of the condition of the sidewalk but also of the dangerous character of such condition; that the defect in the sidewalk under review was a minor defect; that there was present "no element of conspicuousness or notoriety showing any dangerous character in the slight rise of a portion of a sidewalk, which would put the city authorities upon inquiry or place upon them the duty of remedying the defect or condition pursuant to the provisions of the statute." It was held that "the continued existence of a minor defect is in itself insufficient to impose liability upon the city for injuries resulting therefrom."

In the Whiting Case one portion of the sidewalk was left three-fourths of an inch above the adjoining portion. In the case now under review one portion of the sidewalk was left one inch above the adjoining portion. The difference of one-fourth of an inch is not sufficient to take the present case outside the ruling in the Whiting Case, and on the authority of that case the judgment must be reversed.

It is so ordered.

We concur: CRAIL, P. J.; McCOMB, J.

22 Cal.App.2d 592

HALTERMAN v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 5863.

District Court of Appeal, Third District, California.

Sept. 23, 1937.

1. Appeal and error 🔑**78(2)**

An order striking a party as a cross-defendant was a "final judgment" and a termination of action as to that party and was therefore appealable.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

2. Appearance 🔑**19(2)**

Dismissal and nonsuit 🔑**55**

A party who appeared generally by demurrer and motion to strike her as a cross-defendant from action thereby submitted herself to court's jurisdiction, and court improperly dismissed party without a hearing upon the merits.

3. Parties 🔑**54**

In action by contractor constructing dam across creek against public utility for damages for interfering with construction by discharging water into creek, where utility in a cross-complaint set up a right to discharge water into creek and a dedication of right to public use and prayed for decree quieting title to right, landowner was a "proper party" cross-defendant, since question of utility's right involved title to land itself.

[Ed. Note.—For other definitions of "Proper Party," see Words & Phrases.]

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by J. W. Halterman and Carrie A. Gladding against the Pacific Gas & Electric Company, wherein defendant filed a cross-complaint. From an order granting a motion to strike Carrie A. Gladding as a cross-defendant from the action, defendant appeals.

Reversed.

Thomas J. Straub and W. R. Dunn, both of San Francisco, and T. L. Chamberlain, of Auburn, for appellant.

Milton M. Hogle, and Duard F. Geis, both of Willows, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this case a complaint was filed by Carrie A. Gladding and J. W. Halterman against the Pacific Gas & Electric Company wherein plaintiffs alleged that Carrie A. Gladding was the owner of a ranch situated in Placer county, through which ran a water course known as Coon creek, and that during a time specified plaintiff Halterman, acting under a contract with plaintiff Carrie A. Gladding, was erecting a dam across Coon creek, and while so engaged defendant, Pacific Gas & Electric Company, diverted and released a large volume of water into Coon creek, which waters interfered with the construction work of plaintiffs, to their damage.

By subsequent proceedings a third amended and supplemental complaint was filed by Halterman alone, in which he alleged ownership of the property in Carrie A. Gladding, his right thereon as invitee, and injury to him through discharge of waters into Coon creek by defendant. Defendant answered this amended complaint and also filed a cross-complaint, naming therein as cross-defendants Carrie A. Gladding and Halterman, and setting up the right of the defendant, a public utility, to discharge waters into Coon creek over the lands of Mrs. Gladding, and a dedication of the right to public use, and prayed for a decree to quiet title of the cross-complainant to such right.

Although no order was made for the bringing in of Carrie A. Gladding as a new party in the cross-complaint, nor was any summons issued or served upon her, she nevertheless appeared and demurred upon the ground that the cross-complaint failed to state a cause of action and that the court had no jurisdiction of the person or subject-matter therein set forth, and also filed a motion to strike the cross-complaint. After a hearing the court sustained the demurrer and granted the motion to strike Carrie A. Gladding as a cross-defendant from the action. From the order granting the motion to strike, defendant and cross-complainant prosecutes this appeal.

[1] The order striking Carrie A. Gladding as a cross-defendant, being a final judgment and a termination of the action as to her, is therefore appealable. Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39.

[2] Inasmuch as respondent Carrie A. Gladding had appeared generally by demurrer and motion, she thereby submitted herself to the jurisdiction of the court, and the court should not have dismissed her without a hearing upon the merits. Molfino v. Pippo, 122 Cal.App. 437, 10 P.(2d) 78.

[3] Furthermore, we are of the opinion that Mrs. Gladding was a proper party cross-defendant in the action. Halterman based his right to maintain his action upon the ownership in Mrs. Gladding of the property described in the complaint. He alleged that he was in possession of the lands as invitee, and that defendant was guilty of trespass. Of necessity, title to the property and the question as to whether the defendant was the owner of the right to divert water across the lands of plaintiff involved the title to the property itself. Inasmuch as this right was questioned, the defendant Pacific Gas & Electric Company, was entitled to have its title quieted in the flowage rights asserted by it, and in order to determine that matter Mrs. Gladding is at least a proper party.

The case of Tonini v. Ericcsen, 218 Cal. 43, 21 P.(2d) 566, is authority for the proposition that where a plaintiff, who is an invitee on land, sues a defendant who has caused water to flow upon the land to the damage of the plaintiff-invitee, and the defendant claims to have acted under a right or easement to flow the water, the defendant, in a cross-complaint to establish his right or easement, is entitled to join the owner of the land as a proper party cross-defendant.

For the foregoing reasons the order striking Carrie A. Gladding as a cross-defendant should be reversed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

9 Cal.2d 556

ROSHER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 16212.

Supreme Court of California.

Sept. 20, 1937.

Rehearing Denied Oct. 11, 1937.

1. Divorce 🔑310

The statutory amendment, raising age of female's majority from 18 to 21 years, operated prospectively to extend minority of female under age of 18 when it became effective, and hence did not terminate her divorced father's obligation under previous court order to make payments for her support during her minority (Civ.Code, § 25, as amended by St.1927, p. 1119).

2. Divorce 🔑310

A court order, requiring divorced husband to pay his former wife stated sum monthly for their daughter's support during latter's minority, which was extended to age of 21 years by subsequent act, did not contemplate termination of such payments when she reached age of 18, fixed by statute in effect when order was made as age of female's majority (Civ.Code, § 25, as amended by St.1927, p. 1119).

3. Divorce 🔑309, 323

The court's power to make and modify orders for support of divorced parents' minor children is independent of any reservation of such authority in original divorce decree, and proper provision for their support may be made at any time during their minority in light of circumstances at time of application for support order (Civ.Code, § 138).

4. Divorce 🔑324

An order for support of divorced parents' minor children is not judgment in sense of being final adjudication of parents' and children's rights and duties and does not crystallize or limit parents' duty to support children, but merely defines extent thereof during life of order (Civ.Code, § 138).

5. Constitutional law 🔑110

A divorced man acquires no vested right respecting his duty to support his minor children under divorce decree or custody orders made in connection therewith, so that no such right is impaired by holding that such decree or support order does not limit his liability for minor child's support to period of minority fixed by statute in effect when it was entered (Civ.Code, § 25, as amended by St.1927, p. 1119; § 138).

6. Divorce ⚷324

Orders for support of divorced parents' minor children must be considered as made in light of statute empowering court to provide for minor child during period of minority and power of state to change such period (Civ.Code, § 25, as amended by St.1927, p. 1119; § 138).

7. Divorce ⚷310

Orders for support of divorced parents' minor daughter by her father during her minority must be construed as continuing in effect until she reaches majority or changed circumstances require or authorize modification thereof, in absence of words of definite limitation in time (Civ.Code, § 25, as amended by St.1927, p. 1119; § 138).

8. Divorce ⚷311

A minor's earnings during time that order requiring her divorced father to make payments for her support during her minority is in effect have no bearing on his guilt or innocence of contempt in discontinuing payments after she reached age fixed as that of majority by statute in force when order was made, but are relevant only for court's guidance in making or modifying support orders (Civ.Code, § 25, as amended by St.1927, p. 1119; § 138).

◆

In Bank.

Proceeding by Charles G. Rosher to review an order of the Superior Court of the State of California in and for Los Angeles County adjudging petitioner in contempt of court.

Order affirmed.

Prior opinion, 62 P.(2d) 1384.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, and Flint & Mackay, all of Los Angeles, for respondent.

PER CURIAM.

This case was transferred to this court after hearing and decision by the District Court of Appeal, Second District, Division 2, in order that we might give further consideration to the question of the effect of the amendment of section 25 of the Civil Code (Stats. 1927, p. 1119) raising the age of majority for females from eighteen to twenty-one years, upon a support order in a divorce action made prior to its effective date.

The case is here on proceedings to review an order adjudging petitioner to be in contempt of court for failure to pay the amount specified in the order. Lolita H. Rosher obtained an interlocutory decree of divorce from petitioner in 1923. At that time the court awarded her the custody of their minor daughter and ordered petitioner to pay $100 a month for the child's support during her minority, or until her marriage. On April 8, 1927, the order was modified to raise the monthly sum to $150 to continue "until further order of the court," instead of until majority. Both at the time of the original order and at the time of its modification in April, 1927, section 25 of the Civil Code fixed eighteen years as the age of majority for females. The amendment raising the age to twenty-one became effective July 29, 1927. Dorothy Lacey Rosher, daughter of plaintiff and petitioner, was born July 10, 1914, and was about nine years old at the time of the divorce decree and the original support order. She became eighteen years of age in July, 1932, and twenty-one in July, 1935. The petitioner made payments in accordance with the orders until and including December, 1932. The contempt found by the court below consists in his willful refusal to make payments thereafter. It is the contention of petitioner, that since at the time of the rendition of the original decree eighteen was the age of majority for females, his obligation to make payments under the order ceased when his daughter attained that age.

[1] Petitioner relies upon the case of Kendall v. Kendall, 122 Cal.App. 397, 398, 10 P.(2d) 131. That case is undoubtedly squarely in point. It held that the amendment of section 25 of the Civil Code could not be applied retroactively so as to impair existing rights and that the father's right to have his liability cease when the minor reached the age of majority fixed by statute at the time the judgment was rendered was one of the fruits of the judgment and vested in him as a property right. With the conclusions announced in the Kendall Case we do not agree. The statutory amendment operates prospectively to extend the period of minority of a child who has not reached majority at the time it becomes effective. Indeed, it is not and could

not be contended that the period of minority was not extended by the amendment for purposes other than the termination of the father's obligation under the order. See Coleman v. Coleman, 51 Ohio App. 221, 200 N.E. 197, and Springstun v. Springstun, 131 Wash. 109, 229 P. 14, 16, 40 A.L.R. 595, cited by petitioner and by the court in Kendall v. Kendall, supra.

[2] In Springstun v. Springstun it was concluded, however, that since the decree, when entered, contemplated support only until the age of eighteen, the decree was satisfied when the minor became eighteen. It was the theory of the Washington court that the decree was "as definite and certain in that respect as it would have been had the decree expressly named the 18th year of the minor as the date of its expiration." In our view this is not the proper interpretation to be placed upon an order for the support of a minor made in connection with an award of custody in a divorce action.

[3-5] It is settled that the power of the court to make and modify orders for the support of minor children under section 138 of the Civil Code is independent of any reservation of authority in the original decree; that proper provision for their support may be made at any time during the period of minority; that the propriety of the provision to be made is to be determined in the light of the circumstances existing at the time the application is made; and that even an agreement by the mother that she would not ask for such an order cannot bar the child's right to apply for an order for proper support. Lewis v. Lewis, 174 Cal. 336, 163 P. 42. Such an order cannot, therefore, be considered a judgment in the sense of its being a final adjudication of the rights and duties of the parent and the minor child. It was not intended to, and does not operate to, crystallize or limit the duty of the parent to support his minor child, but merely defines the extent of his duty during the life of the order. Dixon v. Dixon, 216 Cal. 440, 14 P.(2d) 497; Sherer & Co. v. Indus. Acc. Comm., 182 Cal. 488, 188 P. 798; Lewis v. Lewis, supra; Watkins v. Clemmer, 129 Cal.App. 567, 19 P.(2d) 303; So. Cal. Edison Co. v. Indus. Acc. Comm., 92 Cal.App. 355, 268 P. 415. In Moore v. Superior Court, 203 Cal. 238, 263 P. 1009, 1011, it is said: "The language of section 138 of the Civil Code is read into every decree of divorce which purports to deal with the care, custody, and support of the minor children of the parties to the action, and, this being so, whatever orders or decrees the trial court may make or enter in the premises are not in the nature of final judgments which determine the relation of the parties to each other, or to the action or to the subject-matter over which the court has thus retained all of the jurisdiction which it had during every stage of the proceedings and pendency of such action." It follows that it cannot be said that any vested right with regard to his duty to support or care for his minor children is acquired by a divorced parent as a result of the divorce decree or custody orders made in connection therewith. Hence no such right is impaired by holding that the entry of a divorce decree or the making of a custody or support order does not operate to limit the petitioner's liability to his minor child to the period of minority fixed by statute at the time of the entry of the decree or order. In the absence of any such decree, his obligation would continue throughout the extended period of minority. The divorce decree and support order neither separately nor in conjunction constitute a permanent and final adjudication of the extent of his obligation to support his minor child.

[6, 7] It is also argued that the court did not have in mind the extended period of minority at the time either of the orders was made. The quotation from Moore v. Superior Court, supra, disposes of this contention. Such orders must be considered to have been made in the light of section 138 of the Civil Code, which empowers the court to provide for the minor child during the period of minority, and also in the light of the power of the state to change the period of minority. Neither order can be said to have intended more than the making of a proper provision for the petitioner's minor daughter at the time it was made, and both, in the absence of words of definite limitation in time, must be construed as continuing until majority or until changed circumstances require or render proper the granting of an application for modification. The order of April 8, 1927, expressly so provided and, in view of the date of the amendment of section 25, may have been so framed in contemplation of the change in the section becoming effective.

[8] The conclusions above reached render it unnecessary to discuss the power of the court to make support orders for the

benefit of adult children. The earnings of the minor during the time the order was in effect can have no bearing on the petitioner's guilt or innocence of the contempt found. They are relevant only for the guidance of the court in making or modifying orders for support. Howe v. Howe, 206 Cal. 1, 272 P. 751.

In so far as the case of Kendall v. Kendall, 122 Cal.App. 397, 398, 10 P.(2d) 131, is in conflict herewith, it is overruled.

The order is affirmed.

9 Cal.2d 583

Ex parte HARTMAN.

Cr. 4099.

Supreme Court of California.

Sept. 21, 1937.

1. Criminal law 🔑252(2)

Statutes dealing generally with form of indictments and informations are not applicable to pleadings in justice's courts, which are governed by separate statute (Pen.Code, §§ 950–952, 1426, and § 959, subd. 4, as amended by St.1935, p. 859).

2. Criminal law 🔑252(2)

Though criminal complaint in justice's court should allege township in which offense was committed, statutes do not specifically so require (Pen.Code, § 1426).

3. Criminal law 🔑276

In criminal proceeding in justice's court, if offense was not committed within township, it is incumbent on defendant to so allege (Pen.Code, § 1426).

4. Habeas corpus 🔑92(1)

A defendant who, under circumstances negativing possibility of prejudice to him, suffers doubtful record to become final against him without objection may not thereafter freely criticize record in indirect attack thereon.

5. Habeas corpus 🔑30(2)

A defendant convicted in justice's court under two counts, one of which alleged township and county wherein offense was committed, was not entitled to habeas corpus to secure his release on imprisonment under conviction for second offense on ground that count charging second offense did not allege township and county wherein offense was committed, in absence of showing that defendant was not in fact convicted in proper township (Pen.Code, §§ 950–952, 1426, and § 959, subd. 4, as amended by St. 1935, p. 859).

In Bank.

Proceeding for writ of habeas corpus by E. B. Hartman.

Writ of habeas corpus discharged, and petitioner remanded.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., Lionel Browne, Deputy Atty. Gen., and Stanley Mussell, Dist. Atty., of San Bernardino, for respondent.

SHENK, Justice.

By complaint filed in the justice's court of San Bernardino township, county of San Bernardino, the petitioner was charged in count 1 with the violation of section 15 of the State Chiropractic Act (St.1923, p. lxxxviii), a misdemeanor, committed on January 8, 1936, "in San Bernardino Township, County of San Bernardino, State of California." In count 2 he was charged with the violation of section 17 of the State Medical Act (St.1913, p. 734, as amended by St.1933, p. 1276), a misdemeanor, committed on January 8, 1936, "within the State of California."

The petitioner was convicted on both counts, was sentenced to serve 90 days on the first count and 180 days on the second count, the sentences to run concurrently. He served the 90-day sentence on count 1 in the county jail of San Bernardino county, and upon the expiration thereof filed this application for his release from custody on the ground that his further imprisonment under count 2 is illegal. His contention is that count 2 is insufficient upon which to base a conviction because it is not alleged therein where the alleged offense was committed except "within the State of California." In other words, it is contended that the absence of an allegation that the crime was committed in San Bernardino township or in the county of San Bernardino rendered the count insufficient to warrant conviction and imprisonment.

[1] The petition alleges that count 2 does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code. Those sections have to do with the form of indictments and informations and, together with subdivision 4 of section 959 of the same Code, as amended by St. 1935, p. 859, provide that the pleading show the county in which the offense was committed. But those sections are not applicable to pleadings in justice's courts which are governed by section 1426 of the Penal Code, wherein it is provided that the complaint in a justice's court shall set forth the offense charged "with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified."

[2] Good pleading would require that the complaint allege the township in which the alleged offense was committed, but the Code sections governing pleadings in justice's courts do not specifically provide that such fact be alleged, and it was held in Re Kaster, 52 Cal.App. 454, 198 P. 1029, that the failure of the complaint to designate the township in which the crime was committed was not fatal to the execution of a judgment of conviction on such a defective pleading. It was there held that nothing could be found in the statute making it mandatory to insert in the complaint the name of the township wherein it is claimed the offense was committed; that while the writ of habeas corpus would lie when the complaint wholly failed to state a public offense, the writ could not be made to subserve the office of a demurrer; and that it was too late to raise the point after the judgment of conviction had become final in a case where it appeared that on the trial the court had jurisdiction of the subject-matter of the action and of the person of the defendant. The holding of the District Court of Appeal was approved by this court in Re Kaster, 185 Cal. 647, 198 P. 1031.

[3-5] In the present proceeding it is not contended that the offense with which the petitioner was charged and convicted was not committed in the township of San Bernardino. If such was not the fact it was incumbent on the petitioner so to allege. The complaint was entitled: "In the Justice's court of San Bernardino Township, County of San Bernardino, State of California." The first count alleged the matters which the petitioner claims the second count should have contained. The fact that in pleading the second count the names of the township and county were omitted could not have operated to the prejudice of the petitioner. When a defendant, under the circumstances here shown, suffers a doubtful record to become final against him without objection, he may not thereafter freely criticize it in an indirect attack upon it. Campbell v. Aderhold (C.C.A.) 67 F.(2d) 246. This court would not be justified in releasing a petitioner on habeas corpus who even now is not denying that he was convicted in the township wherein the offense was committed, but complains only that the complaint charging him with the offense did not allege that it was committed in that township.

The writ is discharged and the petitioner is remanded.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; EDMONDS, J.

---

9 Cal.2d 571

PACKARD v. MOORE.

L. A. 16294.

Supreme Court of California.
Sept. 20, 1937.

1. Appeal and error 🔑1005(1)

Jury's and trial court's opinion that injured party was not driving automobile with which collision occurred and that such automobile did not swerve into center lane of highway, there to be struck by defendant's automobile, was binding upon reviewing court.

2. Damages 🔑171

In personal injury action, evidence of financial condition of injured party is inadmissible.

3. Trial 🔑55

In personal injury action, evidence of plaintiff's financial condition which was admitted primarily for purpose of explaining previous answer of witness, if admissible for that purpose, was not rendered inadmissible by fact that it may have prejudiced defendant.

4. Evidence 🔑558(1)

In action for injuries where expert testified on cross-examination that he had submitted a bill to plaintiff for services rendered, but did not expect to get paid, he was entitled to explain on cross-examination that he did not expect to get paid because plaintiff was a penniless girl, since the unexplained testimony would have justified inference that expert was so personally interested in plaintiff that he was rendering his services free, and his testimony would have been correspondingly weakened.

5. Appeal and error 🔑216(1)
Trial 🔑207

In action for injuries, defendant was entitled to instruction that doctor's statement that plaintiff was a penniless girl was admissible only for purpose of explaining previous answer of doctor to effect that he did not expect to get paid for his services, but he could not complain of absence of such instruction where he failed to make request therefor.

6. Trial 🔑127

In personal injury action, evidence that defendant is covered by insurance is rendered inadmissible only where there is an avowed purpose and successful attempt to bring such fact before the jury, but is not condemned where the information comes in incidentally in attempting to prove other facts or where the particular answer was not sought or anticipated.

7. Trial 🔑132

In action for injuries sustained in automobile collision, where nurse at hospital in which plaintiff was confined after her injuries, in describing conduct of doctor who visited plaintiff, testified that doctor stated that insurance company had sent him, but plaintiff's counsel had not anticipated such reference to insurance, and immediately requested that the statement be stricken, court did not err in refusing to declare mistrial.

8. Appeal and error 🔑1060(1)

In action for injuries sustained in automobile collision, statement of nurse from hospital at which plaintiff was confined to effect that visiting doctor had commented that he was from insurance company was not prejudicial where prior witness had testified without objection that defendant had told witness he was traveling approximately 60 miles an hour at time of accident but was going to say around 45 because of his insurance.

9. Evidence 🔑359(2)

In action for injuries, introduction of photographs of plaintiff showing nature of injuries upon her face while in hospital was not improper.

10. Trial 🔑206

In action for injuries sustained in automobile collision, instruction that jury was at liberty to accept any facts which contradicted or outweighed the testimony of any witness regarding manner in which accident occurred and disregard the testimony of witness was not improper.

11. Trial 🔑296(8)

In action for injuries sustained in automobile collision, instruction that burden was on defendant to prove contributory negligence by preponderance of evidence was not ground for reversal where, when considered in connection with other instructions, it could not have prejudiced the defendant, although allegedly prohibiting jury from considering any of plaintiff's testimony tending to show contributory negligence.

In Bank.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Billie Packard against Matthew Joseph Moore. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 64 P.(2d) 1188.

Butcher & Haines, of Santa Barbara, for appellant.

Griffith & Thornburgh and Hugh M. Lindsey, all of Santa Barbara, and Thomas Glenn and Holbrook, Taylor, Tarr & Reed, all of Los Angeles, for respondent.

CURTIS, Justice.

[1] Appeal from a judgment in favor of plaintiff for personal injuries sustained by her in a collision between an automobile in which she was riding and one driven by the defendant. The collision occurred on the morning of July 14, 1935, at about 1:30 a. m. near the town of Sandyland on United States highway No. 101, between Carpenteria and Santa Barbara. Plaintiff and her companion, Jerry Rasmussen, were re-

turning from Ventura to their home in Santa Barbara in a Buick sedan. They were accordingly traveling northerly. The defendant was returning from Santa Barbara where he had attended a theater. Defendant was driving southerly in a Ford machine, and had with him Arline Thurmon and Phoebe Bowen. They were traveling behind a third machine, a Buick coupé, driven by a Mr. Ledford and occupied by the driver, his wife, a Mr. Johnson, and a Miss Frederick. When the defendant arrived at a point about a mile north of Carpenteria, he attempted to pass the Ledford car. The highway at this point consists of three lanes plainly marked with white lines. The Ledford car was traveling in the right lane, and defendant had been following it in the same lane. In attempting to pass the Ledford car, the defendant turned out of the right lane of the highway to his left, and, when abreast of the rear end of the Ledford car, collided with the car in which plaintiff was riding. Plaintiff was seriously injured. As in most instances in cases of this character, there is a distinct conflict in the evidence as to the cause of the collision and as to the person responsible therefor. In this action the plaintiff claims that defendant pulled out suddenly from behind the Ledford car and drove directly across the highway into the left lane of the highway in which plaintiff's machine was traveling. On the other hand, the defendant contends that, as he turned out from behind the Ledford car into the center lane of the highway, the car in which plaintiff was riding swerved into the center lane and struck defendant's car. There was also a conflict in the evidence as to who was driving the car in which the plaintiff was riding. Plaintiff claims that it was being driven by her companion, Jerry Rasmussen, while the defendant contends that plaintiff herself was the driver of the car. A large portion of appellant's brief is directed to a discussion of the evidence for the purpose, not so much of showing that there is no evidence to support the verdict of the jury in favor of the plaintiff, but to impress the court with the belief that the weight of the evidence upon each of the two points above mentioned was in appellant's favor, and, therefore, the errors of law to which attention is subsequently called in his brief were so serious as to demand a reversal of the judgment. The respondent meets this argument with a recital of the evidence in her behalf, and makes the claim that this evidence outweighs in a marked degree that of appellant upon the question of the negligence of the latter and the contributory negligence of the respondent. It is sufficient for the purpose of this appeal that the jury and the trial court evidently were of the opinion that the preponderance of the evidence upon these issues was on the side of the respondent, and their determination of the matter is final in so far as a reviewing court's power extends. It might not be amiss to refer to the fact that a disinterested witness stated that the appellant was traveling over the highway at a speed of 60 miles an hour as he passed this witness, and that within 20 seconds after appellant passed he heard the crash of the collision. The skid marks shown on the highway immediately after the collision support respondent's theory of the case rather than that of the appellant. Both respondent and her companion, Jerry Rasmussen, testified positively that appellant crossed over on to the outer lane and struck their car, while their car was being driven in this outer lane. It is true that respondent's own testimony is meager, due to the fact that she was rendered unconscious as a result of the collision, and the witness Jerry Rasmussen was shown to have made statements contrary to his evidence given at the trial, and particularly as to who was driving the car in which he and the respondent were riding. Immediately after the collision occurred, he stated that the respondent was driving their car when they met the appellant, and persisted in this statement for some time thereafter, when he changed his position and stated, and later testified at the trial, that he, and not the respondent, was the driver of the car in which they were riding at the time of the collision. He gave as a reason for his earlier statement that he had no license to drive a car and feared that he might be prosecuted criminally for driving without a license should he admit that he, and not the respondent, was the driver on that night. He further stated that, as the car in which he and the respondent were riding was being driven in the proper lane of the highway, he did not think it made any difference as to who was the driver. Evidently both the jury and the trial court, notwithstanding the inconsistent statements of the witness Rasmussen, found the facts to be as stated by him at the trial of the action, and in view of this finding we do not think respondent should be unduly penalized for this discrepancy in his evidence.

[2-5] A reversal of the judgment is asked on the grounds of erroneous admission of evidence, and the giving of erroneous instructions. The appellant first contends that the trial court erred in the admission of evidence as to the financial condition of the respondent, and the refusal of the court to strike out such evidence. The evidence of which complaint is made was given by Dr. Hamilton, one of the respondent's witnesses. Dr. Hamilton had attended the respondent immediately after her injuries, and was called to testify in regard to her then condition. On cross-examination he was questioned regarding the bill he had rendered for his services to respondent, evidently for the purpose of showing his interest in the case. In connection with this portion of his testimony the record shows the following took place:

"Q. You presented this bill which is in evidence here, to Miss Packard for your services? A. Yes.

"Q. Did you include * * * let's see. It is made from September 14th to June 4th. Does that include your services in connection with the attending of the examination by Dr. Van Paing and Dr. Stevens? A. I saw her there just two days ago. How could it?

"Q. I just want to know. Does it include any future services that you may render? A. It includes services rendered.

"Q. Up to that time? A. As the statement shows.

"Q. Of course, you expect to be paid for the time you have given since? A. I do not expect to be paid.

"Q. Oh, I see. You have answered the question.

"Mr. Thornburg: He may explain it.

"The Court: You may explain your answer, doctor. A. I can explain why I do not expect to be paid. Miss Packard is a penniless girl and she has no money to fight this through the higher court.

"Mr. Butcher: I move to strike that out as a prejudicial statement, volunteered by the witness.

"The Court: I do not know. This subject was opened up by you.

"Mr. Thornburg: You opened up the subject by attempting to show he was interested in getting some more money.

"The Court: It is a statement, as I see it, in explanation of his answer, which would tend to overcome the inferences which your question naturally gives rise to."

This motion to strike was denied on the ground that the witness had a right to explain his previous answer, and the fact that in so explaining he gave evidence which otherwise would have been objectionable did not render said evidence inadmissible. It is undoubtedly the settled law in this state that in a personal injury action evidence of the financial condition of the injured party is inadmissible. 8 Cal.Jur. p. 898; Shea v. Potrero & Bay View R. R. Co., 44 Cal. 414; Malone v. Hawley, 46 Cal. 409; Mahoney v. San Francisco & San Mateo Ry. Co., 110 Cal. 471, 42 P. 968, 969, 43 P. 518; Green v. Southern Pacific Company, 122 Cal. 563, 55 P. 577; Story v. Green, 164 Cal. 768, 130 P. 870, Ann.Cas.1914B, 961; Ensign v. Southern Pacific Co., 193 Cal. 311, 223 P. 953; Wright v. Broadway Department Store, 199 Cal. 562, 250 P. 572. In each of these cases the objectionable evidence was evidently admitted for the express purpose and with the intent of showing that the plaintiff was without financial means. It was not admitted for any limited or special purpose but solely to show the poverty of the plaintiff. The case of Mahoney v. San Francisco & San Mateo Ry. Co., supra, is typical of the other cases cited. In that case a widow and her six children were suing to recover damages for the death of the husband and father, which was alleged to have been caused by the negligence of the defendant. The plaintiffs were allowed to prove that the children had no means of their own. In reversing the judgment in favor of the plaintiffs the court said: "Such testimony could have been offered for no other purpose than to create prejudice, and should have been excluded." These cases differ materially from the instant case where the evidence of plaintiff's financial condition was admitted primarily for the the purpose of explaining the previous answer of the witness, and, if it was admissible for that purpose, the fact that it may have prejudiced the defendant did not render it inadmissible. People v. Burke, 18 Cal.App. 72, 122 P. 435. The present action in respect to the question under discussion is much like the case of Muller v. Hale, 138 Cal. 163, 167, 71 P. 81, 82. In that case counsel for the defendant in cross-examining the plaintiff drew from her the statement that she had received no medical treatment since she left the hospital. On redirect examination the plaintiff was asked why she had not received medical treatment since leaving the hospital and replied, "Because I was financially embarrassed and my circumstances did not allow me." This court held the evidence was admissible as it was "simply in line of explaining why she did not have any medical attendance, and was entirely proper." Practically the same condition in its legal aspect was shown to exist in the proceedings in the present action concerning the testimony of Dr. Hamilton. Had no explanation been made of his answer, it might have been inferred by the jury that the relations existing between Dr. Hamilton and the plaintiff were of such a friendly nature that the doctor was rendering her medical service without charge. Such an inference, if permitted to continue, would have shown that the doctor had such a personal interest in the plaintiff that he was treating her free of charge, and would have materially weakened the effect of his evidence to the prejudice of the plaintiff. The evidence was admissible only for the purpose of explaining the previous answer of the doctor, and the defendant was entitled to an instruction to that effect. However, he failed to ask for such an instruction. He cannot, therefore, complain of the absence of such an instruction.

In the following cases it was held that evidence of the poverty of the plaintiff under circumstances similar to those in the instant case was properly admitted: Hughes v. Quackenbush, 1 Cal.App.(2d) 349, 37 P.(2d) 99; McNally v. Casner, 128 Cal.App. 680, 18 P.(2d) 94; Ashley v. Rivera, 220 Cal. 75, 29 P.(2d) 199. From these authorities we conclude that the trial court did not err in permitting Dr. Hamilton to explain his answer as to the reason for his not expecting payment for certain services rendered by him to the plaintiff in this action.

[6, 7] The further contention is made by the appellant that the court erred in not declaring a mistrial and dismissing the jury by reason of the injection into the case of evidence that defendant carried indemnity insurance. The criticized evidence was given by Irene Fenton, a nurse at the hospital where the plaintiff was confined after her injuries. She was describing the visit of Dr. Stevens to the plaintiff while the latter was a patient at said hospital. In the course of her narration of the events transpiring during this visit the witness stated: "And he [Dr. Stevens, addressing the plaintiff] said: 'I would like to ask you a few questions.' * * * He leaned over and examined the scar on her face, and I believe she said * * * no, he asked if she had any other injuries, and she said, 'I have some bruises on my knees', and he reached down and pulled the covers back. He just pulled them off her like that [illustrating] and she grabbed them back, and she said, 'Don't uncover me here before God and everybody'. And he reached down and took hold of the covers, and he said, 'Well, I am not doing this for pleasure. The insurance company sent me.'" Counsel for the defendant immediately moved to strike out the statement, "The insurance company sent me." The attorney for plaintiff consented to the motion, stating, "I did not know it was coming." Counsel for defendant further assigned the statement of the witness as prejudicial misconduct, and requested the court to declare a mistrial. The court granted the motion to strike out the objectionable evidence of the witness that the doctor stated that he was sent by the insurance company, but denied defendant's motion to declare a mistrial.

In Citti v. Bava, 204 Cal. 136, 138, 266 P. 954, 955, a judgment in favor of the plaintiff in an action to recover damages for personal injuries was reversed on the ground that the defendant was prejudiced by the admission of evidence that he carried indemnity insurance. In that case the court stated: "The evident purpose of counsel for the plaintiff was to prove the fact of the compromise and settlement with Aftergut by the insurance carrier of the defendant as an admission of liability on the part of the defendant and to get before the jury the fact that the defendant was indemnified by a policy of insurance." In Squires v. Riffe, 211 Cal. 370, 374, 295 P. 517, 519, this court reversed a judgment in a similar action on the ground that evidence that the defendant carried insurance was improperly admitted. In that case the defendant objected to a question propounded to plaintiff while on the witness stand on the ground that it was an attempt to bring in extraneous matters before the court. The objection was overruled, and the plaintiff answering the question detailed a conversation with the defendant in which she stated that she was insured. The court held that, "It must be presumed that counsel for the plaintiff knew the answer which his client would give to the objectionable question," and citing Citti v. Bava, supra, reversed the judgment. In Rising v. Veatch, 117 Cal. App. 404, 406, 3 P.(2d) 1023, 1024, the same question was involved. The objectionable testimony was given by the plaintiff in answer to a question propounded to her by her attorney "over repeated objections of appellant's counsel." The court in that action followed the case of Squires v. Riffe, supra, and reversed the judgment in favor of plaintiff on the ground that "the question which elicited the answer complained of was put to counsel's own client, and counsel either knew, or should have known, the answer to be expected." The appellant cites and relies upon these decisions in support of his contention that the judgment herein should be reversed. In each of these cases the decision holding the evidence that defendant carried liability insurance was prejudicial error was based upon the fact that the attorney for the plaintiff knew, or was presumed to have known, that the answer of the witness would refer to the matter of insurance and that he intentionally asked the objectionable question for that purpose. We do not think in the instant case that the same condition existed as was shown in those cases. Immediately upon the witnesses' reference to the insurance of the defendant, the attorney for plaintiff asked to have the witness' statement stricken out, and disclaimed any knowledge that the witness would so testify. It further appears that witness under examination was not the client of the attorney, and that the attorney had had but little opportunity to discuss with her the nature of her evidence before she was called to testify. Under these conditions we do not think that we can with any fairness indulge in the presumption that the attorney knew what the testimony of the witness would be or that he was guilty of bad faith in injecting the objectionable evidence into the case. The reference by the witness to insurance came at the close of a rather lengthy answer, and it is apparent her statement that the doctor said that, "The insurance company sent me," was merely given in an attempt to bring before the court the conduct of the doctor in his visit to the plaintiff. The case in our opinion is governed by the decision in Hughes v. Quackenbush, 1 Cal. App.(2d) 349, 358, 37 P.(2d) 99, 103, where the court states the proper rule as follows: "While courts have condemned repeatedly attempts to bring before a jury the fact that insurance exists, their condemnation extends only to cases where there is an 'avowed purpose and successful attempt' to bring the fact before the jury. It does not extend to cases where the information comes in, incidentally, in attempting to prove other facts, or where the record does not show that the particular answer was sought or anticipated."

[8] There is another all sufficient reason why the evidence of Irene Fenton, as to the statement of the doctor that the insurance company sent him, was not prejudicial to the defendant's case. There was already evidence in the case that the defendant was insured. This evidence was given by a witness who stated that the defendant told him, "he [defendant] was traveling approximately 60, but he was going to say around 45 because of his insurance." This evidence was received without objection on defendant's part and no motion was made to strike it from the record. As testimony of defendant's insurance was before the court and jury without objection by the defendant, evidence of the same character could not seriously, if at all, prejudice the rights of the defendant.

[9] Appellant's objection to the introduction of photographs of the plaintiff showing the nature of the injuries upon her face while in the hospital is without merit. The photographs portrayed possibly more strikingly plaintiff's injuries than oral testimony could have done. This fact did not render them inadmissible. The jury was entitled to know of her true condition and, if that fact could be more accurately portrayed by photographs than by the testimony of the doctor, or others, it was the right of the plaintiff to resort to that method of proof. Crabbe v. Rhoades, 101 Cal.App. 503, 282 P. 10; 10 Cal.Jur. p. 896. The case of O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, is not applicable to the facts in this case.

[10] Appellant attacks instructions numbered 18 and 31, given by the court at the request of the respondent. Instruction 18 is as follows: "If you find from the preponderance of the evidence that any facts disclosed by the evidence contradict or outweigh the testimony of any witness regarding the manner in which the accident occurred, if you find it did occur, then you

are at liberty to accept such facts and disregard the testimony of the witness." Appellant contends that the reference to "any facts" in the instruction must be held to mean "any physical facts," and upon this premise builds up a most formidable argument.

The court refused to give a similar instruction in which the word, "facts" appearing in the instruction was preceded by the word, "physical." Evidently the trial court did not consider the two instructions identical, or that the instruction given should be construed as referring to "physical facts." In view of this action of the trial court, we are not inclined to agree with the appellant's construction of this instruction. We see nothing objectionable regarding the instruction given. The jury, in effect, was told that any fact proven by a preponderance of the evidence would outweigh the testimony of any witness whose testimony was inconsistent with the proven fact. This must necessarily be so. A fact in the case could not be proven by the preponderance of the evidence unless it outweighed every other fact attempted to be proven in the case upon the same issue. The instruction, while not stated in as clear language as we would desire, did not misstate the law upon the subject of the preponderance of the evidence, and we do not believe that the jury was misled thereby.

[11] By instruction No. 31 the court instructed the jury that the burden was upon the defendant to prove contributory negligence by a preponderance of evidence. The instruction was not a formula instruction and, when considered in connection with other instructions of the court, could not have prejudiced the appellant. The criticized instruction finds an almost exact parallel in one discussed by this court in the case of Olsen v. Standard Oil Co., 188 Cal. 20, 25, 204 P. 393, 396, where the question now raised by the appellant was disposed of in the following language: "The argument apparently assumes that the jury must have understood it [the instruction] to mean that in deciding the question they could consider only the evidence introduced by the defendant, and that evidence produced by the plaintiff tending to show contributory negligence could not be considered. There was nothing in the instruction on the subject that could be so understood."

This concludes a discussion of all questions raised by the appellant in support of his appeal. In our opinion none of them, nor all of them collectively, would justify a reversal of the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; EDMONDS, J.

JESSE et al. v. GIGUIERE.*

Civ. 10388.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1937.

Rehearing Granted Oct. 15, 1937.

1. Automobiles 🔑244(36)

In guests' action against motorist for injuries sustained in collision occurring at or near obstructed intersection when motorist turned into road and collided with oncoming automobile in which guests were riding, evidence supported implied finding that acts of motorist were proximate cause of accident.

2. Appeal and error 🔑928(4)

Where it did not appear on appeal who requested instructions complained of by defendant or what modification trial court made in instruction admittedly requested by defendant, reviewing court, in support of judgment, was required to assume that the instructions were given at request of defendant and that the modification, if any, was not erroneous.

3. Trial 🔑260(8)

In guests' action against motorist for injuries sustained in collision between motorist's automobile and automobile in which guests were riding, refusal of requested instruction setting out theory of motorist as to cause of accident was not prejudicially erroneous where jury was adequately instructed on every theory advanced by both sides.

4. Trial 🔑244(4)

In guests' action against motorist for injuries sustained in collision between motorist's automobile and automobile in which guests were riding, refusal of requested instruction that jury could consider, in determining whether automobile in which guests were riding was being driven in excess of speed limit, distances automobile traveled after the accident and its movements before it came to a stop was not error, since it is not proper to pick out isolated portions of evidence and instruct thereon.

---

*For subsequent opinion see 74 P.2d 310.

5. Appeal and error 🔑**1004(1)**

Even if awards to husband and wife in action for injuries sustained in automobile collision were inconsistent because of disparity in amounts, reviewing court would not be justified in concluding that award to wife was too much any more than in concluding that award to husband was too little.

6. Damages 🔑**132(3)**

$9,000 awarded woman for injuries consisting of fractures of the transverse processes of the lumbar vertebræ with considerable damage to tissue and muscles, requiring confinement in hospital for one month, where there was evidence that injury was permanent, that she would have to wear a steel corset and could not thereafter do her housework, was not excessive.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Pauline Jesse and another against E. J. Giguiere. From a judgment for the plaintiffs, the defendant appeals. Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Ingemar E. Hoberg, of San Francisco, for respondents.

STURTEVANT, Justice.

From a judgment rendered against him for damages for injuries sustained in an automobile collision, the defendant has appealed.

[1] He contends that the judgment is without support in the evidence for the reason that the evidence will not support a finding that any negligence of defendant proximately caused or contributed to plaintiffs' injuries. The accident occurred on the afternoon of the 9th day of June, 1935, in the city of Burlingame. Burlingame avenue runs east and west. On the north side is a polo field. From the south Channing road runs north to Burlingame avenue opposite the polo field. The intersection of those two streets is, within the meaning of the California Vehicle Act (St.1923, p. 517, as amended), an obstructed intersection. Eucalyptus trees of considerable growth stand somewhat close together along both sides of Burlingame avenue. The curbs of the sidewalks on both the southeast corner and the southwest corner of the intersection are rounded. No marker indicated the center of the intersection and, as we understand the record, no marker indicated the middle line of either Burlingame avenue or Channing road. The plaintiffs were riding as the guests of their son-in-law Sterling L. Hammack. Mrs. Hammack was also riding in the car. Mr. Hammack was driving a Studebaker sedan and was proceeding from the west toward the east along the right-hand side of Burlingame avenue. The defendant and his wife were in the defendant's car, an Oldsmobile sedan, and the defendant was proceeding from the south toward the north along Channing road. The theories of the parties were distinctly different. The defendant contended that he drove north into the intersection, passed to the right of the center of the intersection, and then made a left-hand turn to go west on Burlingame avenue, and as he was about to leave the intersection the accident happened. The plaintiffs contend that Mr. Hammack was driving along the right-hand side of Burlingame avenue at a speed of from 15 to 20 miles an hour, and that when his car reached the westerly property line on Channing road the defendant's car cut the southwest corner of the intersection from 2 to 3 feet north of the rounded curb, dashed into the right-hand side of the Studebaker, and knocked it 15 to 20 feet toward the north with such violence that it was overturned. The defendant asserts the impact occurred while his automobile was still within the intersection, that his entry into the intersection was senior in time and he therefore had the right of way, and that the sole proximate cause of the accident was negligence on the part of the driver of the Studebaker. Under his theory of the case that contention would be sound. However, the plaintiffs introduced evidence from which the jury might have inferred that the defendant cut the corner of the intersection in such a manner as to strike the Studebaker under any circumstances. The diagram used at the trial and

contained in the transcript, and on which the witnesses called by the plaintiffs marked the course of the Oldsmobile, discloses facts indicating that when the rear end of the Oldsmobile was entering the intersection the front end thereof was leaving the intersection, and that the collision took place west of the intersection and when the Oldsmobile had wholly cleared the intersection and was on its left-hand side of Burlingame avenue. Moreover, the markings indicate that the Oldsmobile was not at any time on the north side of the middle line of the avenue. The diagram further indicates that before the impact the Studebaker had not reached the intersection, but by the impact it was knocked to a place about one-half in and one-half without the intersection.

There was evidence that the defendant drove down Channing road in the middle thereof at a speed of from 40 to 50 miles per hour and, without giving any signal of his intention to make a left-hand turn, at a high rate of speed he so swerved around the corner as to make decided marks in the streets for a distance of 25 feet back of the place of the impact. There was evidence that the Studebaker car was proceeding at a rate of from 15 to 20 miles per hour and that the driver did not know the defendant's speed nor his intention of making the turn until the two cars were only about 60 feet apart, measuring the arc around the southwest corner of the intersection. Giving effect to the foregoing facts, we are unable to say there was no factual support to the implied finding that the acts of defendant were the proximate cause of the accident.

[2] The defendant complains because the trial court gave two different instructions and also because it made certain modifications in one of the instructions requested by the defendant and then gave it as modified. That all three instructions were given is clear. Whether the first two were given by the court of its own motion, or on the request of the plaintiffs, or on the request of the defendant, does not appear. What modification, if any, was made in the third one does not appear. In support of the judgment, we must assume the first two instructions were given at the request of the defendant and that the modification, if any, in the third instruction was not erroneous.

[3] It was the theory of the defendant that he drove his car north on Channing road on the right-hand side at a lawful speed, turned to the left on the right-hand side of the center of the intersection, and started to drive west on the northerly side of Burlingame avenue; and, as he did so, the driver of the Studebaker attempted to cut around on the northerly side of defendant's car and, in doing so, wrongfully passed across the path of the defendant's car. So attempting to present his theory of the case the defendant asserts he tendered several specific instructions. He complains because the trial court refused to give them. We find no prejudicial error in the refusal of the trial court. The court gave a very large number of instructions—general and specific. A careful examination of all of them and a comparison with those refused shows that the jury was fully and fairly instructed on every theory advanced by both parties to the record.

[4] Again the defendant requested, and the trial court refused to give another instruction: "In considering whether the driver of the automobile in which Mr. and Mrs. Jesse were riding was or was not exceeding the speed limit, you have the right to consider, for such weight as you deem proper to give the evidence, the distances that his car traveled after the accident, and its movements before it came to a stop." In so refusing the trial court did not err. It is never proper to pick out isolated portions of evidence and instruct thereon. 24 Cal.Jur., "Trial," § 102.

[5, 6] By its verdict the jury awarded Mr. Jesse damages in the sum of $1,000. The defendant makes no objection. It awarded Mrs. Jesse damages in the sum of $9,000, and the defendant contends that sum is excessive. He bases that contention on the fact that the two awards are inconsistent. Perhaps so. But this court has no more authority to draw the conclusion that the award to Mrs. Jesse was too much than to draw the conclusion that the award to Mr. Jesse was too little. There was evidence that Mrs. Jesse sustained fractures of all of the transverse processes of the lumbar vertebræ, with considerable damage to the tissue and muscles. She was confined in a hospital for one month. At the time of the trial (nine months after the accident) she had recovered to a considerable extent. But she had lost thirty pounds in weight and complained of pains in, and restricted motion in her back. There was evidence such injury was permanent, that it would be necessary for her to wear a steel corset, and that she could not hereafter do her housework as she had done before the accident. Considering all of these facts, we may not,

as a matter of law, say that the verdict was excessive. Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 273, 278, 104 P. 312.

We find no prejudicial error in the record. The judgment is affirmed.

We concur: SPENCE, Acting P. J.; OGDEN, Justice pro tem.

---

22 Cal.App.2d 684

GUARANTY LIQUIDATING CORPORATION v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY et al.

Civ. 11504.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1937.

1. Taxation 🔑543(6)

In action against county to recover taxes paid under protest, complaint would fail to state a cause of action in absence of allegations that assessments were excessive.

2. Judgment 🔑719

All matters embraced within issues of a former suit are settled by adjudication therein, and fact findings are conclusive upon parties and their privies in all subsequent proceedings between them involving the same issues.

3. Judgment 🔑91

The judgment of a court of competent jurisdiction entered upon a stipulation of parties has the same effect as if action had been tried on the merits.

4. Judgment 🔑720

Where taxpayer recovered judgment in action against county to recover taxes paid under protest on ground that assessments were excessive, and county paid judgment and took no appeal therefrom, judgment constituted finding that assessments were excessive, and such finding was res judicata in taxpayer's action for writ of mandate requiring county to cancel reassessments on same property for same period in identical amount, and writ should have been granted.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Petition by the Guaranty Liquidating Corporation for a writ of mandate against the Board of Supervisors of Los Angeles County and others. From a judgment denying the petition, plaintiff appeals.

Reversed, with directions.

J. Robert Arkush, of Los Angeles, and Orla St. Clair and H. Arthur Dunn, Jr., both of San Francisco, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment of the trial court denying its petition for a writ of mandate requiring defendants to cancel assessments and taxes upon certain of its real property, plaintiff appeals.

The essential facts are these:

Plaintiff paid under protest taxes assessed against certain of its real property located in the county of Los Angeles and thereafter instituted an action to recover the same. Defendants filed a demurrer to the complaint, and subsequently the parties stipulated that a supplement might be filed to the original complaint (the demurrer theretofore filed to be deemed a demurrer to the supplement as well as the original complaint) and that the court might forthwith rule on the demurrer and enter judgment for the plaintiff, which judgment was to include plaintiff's costs in the sum of $7. Thereafter the court ordered, adjudged, and decreed that the assessments and taxes on plaintiff's property described in the complaint should be set aside and declared void in their entirety, and that plaintiff have and recover of defendant the taxes paid under protest in the sum of $14,127.49 and its costs of suit in the sum of $7.

Subsequently the county paid the judgment in full, and no appeal being taken, the judgment became final. Immediately thereafter the county reassessed the identical amount against the same property for the same tax period.

This is the sole question necessary for us to determine:

Did the judgment in the prior action constitute a finding that the assessed valuation of plaintiff's property was excessive and, if so, was such question res judicata in the present action?

The answer to this question must be in the affirmative. The complaint in the first suit filed by plaintiff contained the following allegations: "That the said assessed valuations, as set forth hereinabove, as found by the said County Assessor, were, and are, unfair, unjust, excessive, exorbitant and greatly over and above the valuations placed by the said County Assessor upon like property having no less value similarly situated, owned and used for like purposes by other property owners in the said County of Los Angeles, and placed an unfair and unequal burden upon the plaintiff; the plaintiff was discriminated against and compelled to pay more than its just and fair proportion of taxes of the said City and County and more than it ought in equity and fairness be compelled to pay; the said valuations placed on the said properties by the said County Assessor was greatly above the value of the said properties for assessment purposes in the said County of Los Angeles, and greatly above the actual cash value of the said properties."

[1] In the absence of the foregoing allegations, that is, that the assessments were excessive, the complaint would have failed to state a cause of action. Ambassador Hotel, etc. v. L. A. County, 94 Cal. App. 143, 146, 270 P. 726.

[2, 3] It is settled that all matters which are embraced within the issues of a former suit are settled and determined by the adjudication therein, and that such findings of fact are conclusive and binding upon the parties and their privies in all subsequent proceedings between them involving the same issues. 34 Cor.Jur. 1072, § 1516; 34 Cor.Jur. 927, § 1331. The judgment of a court of competent jurisdiction entered upon a stipulation of the parties has the same effect as if the action had been tried on the merits. McCreery v. Fuller, 63 Cal. 30, 31; Moore v. Schneider, 196 Cal. 380, 389, 238 P. 81.

[4] Therefore, since in the previous case there was a final judgment adjudicating that the assessments on plaintiff's property were excessive, this finding was conclusive upon the parties to the present action; and, since it is undisputed that the reassessment on the same property for the same period between the same parties was in the same amount as the prior assessments, the peremptory writ of mandate sought by plaintiff in the instant case should have been granted.

For the foregoing reasons the judgment is reversed, and the trial court is directed to enter an order in conformity with this opinion.

We concur: CRAIL, P. J.; WOOD, J.

22 Cal.App.2d 612

FROST et al. v. MIGHETTO et al.

Civ. 2023.

District Court of Appeal, Fourth District, California.

Sept. 23, 1937.

1. Husband and wife 🔑260

Damages recovered for personal injuries suffered by either spouse during marriage relation are community property, in which both have present existing and equal interests, though not equal power of management, control, or disposition (Civ.Code, §§ 161a, 172, 172a).

2. Courts 🔑121(4)

The superior court has jurisdiction of action on properly joinable separate causes, united in single plaintiff and stated in single complaint, if aggregate of several claims equals or exceeds such court's jurisdictional minimum, though no one claim equals such minimum.

3. Courts 🔑121(4)

The superior court has jurisdiction of cause, if plaintiff is entitled to amount equal to or exceeding such court's jurisdictional minimum under allegations of complaint, though demand be made up of several component parts, where total demand concerns and affects all parties to litigation.

4. Courts 🔑121(4)

Husband and wife being jointly interested in total amount recovered in their action for damages suffered in collision between automobiles to extent that such amount belongs to community and its members equally, whether recovery be in their names jointly or individually, sum of amounts sought to be recovered by each determines superior court's jurisdiction (Civ. Code, § 161a).

5. Courts ⚷121(4)

The superior court had original jurisdiction of action by two husbands and their wives to recover damages, suffered in single automobile collision, in total sums exceeding $1,000 for each pair of spouses (Civ. Code, § 161a).

6. Judgment ⚷253(1)

A judgment cannot properly be rendered for greater sum than plaintiff claims or demands in his declaration or complaint.

7. Appeal and error ⚷1151(2)

The superior court's error in allowing plaintiffs special damages in amounts exceeding those alleged in complaint does not require reversal of judgment for them, as District Court of Appeal may correct it by reducing such amounts.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Everard C. Frost and others against Pete Mighetto, William D. Emerick, and others. From a judgment against defendants Pete Mighetto and others, they appeal.

Modified, and affirmed as modified.

A. T. Procopio, of San Diego, for appellants.

von Seggern & Hawkes, of Escondido, for respondents.

MARKS, Justice.

This is an appeal from a judgment in which each respondent was awarded separate damages against appellants. The principal question raised on appeal is the jurisdiction of the superior court of San Diego county over the several causes of action stated in the complaint. The damages were all suffered in a single collision between motor vehicles.

The complaint is made unnecessarily prolix by separating each plaintiffs' demand into several unnecessary causes of action. Everard C. and Bertha L. Frost were husband and wife, as were Guy O. and Lillian Castle.

Everard C. Frost sought recovery of the following separate items of damage: $175 for injury to his automobile, $140 for loss of use of his automobile, $500 for loss of services of his wife, and $25 for nursing and medicines for his wife or a total sum of $840.

Bertha L. Frost sought recovery of $1,000 for personal injuries suffered by her.

Guy O. Castle sought recovery of the following items of damage: $300 for his personal injuries, $250 for loss of services of his wife, and $15 for nursing and medicine for his wife, or a total sum of $565.

Lillian Castle sought recovery of $500 for personal injuries.

The trial court found that Everard C. Frost had been injured in the sum of $136.34 through damage to his automobile. He was given judgment in that amount.

It was also found that Bertha L. Frost had suffered damages for personal injuries in the sum of $500 and special damages for medical aid and attention in the sum of $35. She was given judgment in the sum of $535.

It was further found that Guy O. Castle had suffered damages for personal injuries and for loss of services of his wife in the sum of $200 and special damages for medical attention in the sum of $35. He was given judgment for $235.

Lastly, it was found that Lillian Castle had suffered damages of $650 for personal injuries and $115 for medical aid. She was given judgment in the sum of $765.

There was a class A justice's court in San Diego at the time this action was tried which had original jurisdiction over cases at law where the demand amounted to $1,000 or less. As the damage which each plaintiff sought to recover was $1,000 or less, it is immediately apparent that, unless some special circumstance exists here, original jurisdiction of the case rested in the justice's and not in the superior court. See Colla v. U-Drive Autos, Inc., 111 Cal. App.(Supp.) 784, 294 P. 378; Heavilin v. Westchester Fire Ins. Co., 12 Cal.App.(2d) 695, 56 P.(2d) 252.

To escape the effect of this rule respondents urge that, as Mr. and Mrs. Frost are husband and wife as are Mr. and Mrs. Castle, any recovery by the respective spouses would be community property belonging to both; that each spouse had such interest in the recovery of the other that we should measure original jurisdiction by the combined demand of each group. If this rule is applicable here, the superior court would have original jurisdiction of the action as the Frosts sought recovery of $1,840 and the Castles of $1,065.

The exception to the general rule upon which respondents rely is thus stated in 15

Corpus Juris 771: "Where several parties sue jointly for the recovery of money or property, claiming under one common right, and the adverse party is wholly unaffected by the manner in which it may be apportioned in case of recovery, it is the aggregate sum of their several claims which determines the amount in controversy."

[1] It is well established in California that damages recovered for personal injuries of either spouse suffered during the existence of the marriage relation are community property. In re Strand, 123 Cal. App. 170, 11 P.(2d) 89, 90, it is said: "The right of action to recover for personal injuries sustained by either husband or wife is community property, and their interests in such right of action are 'present, existing and equal interests.' Civ.Code, § 161a. However, under the law of this state the injured party may bring the action without joining the other. Code Civ.Proc. § 370."

[2, 3] The rule for determining jurisdiction where several claims have been vested in a single plaintiff by assignment is thus clearly stated in Hammell v. Superior Court, 217 Cal. 5, 17 P.(2d) 101, 102:

"While the decisions of other states are not in complete accord upon this proposition (15 Cor.Jur. 768-771, §§ 64, 65; 7 R.C. L. 1055, § 91), it has long since been settled in this state, that, where separate causes of action, properly joinable, are united in a single plaintiff and set forth in a single complaint, the superior court has jurisdiction, to the exclusion of inferior courts, if the aggregate of the several claims equals or exceeds the jurisdictional minimum of the superior court, although no one of the claims equals such jurisdictional minimum. (Bailey v. Sloan, 65 Cal. 387, 4 P. 349; Ventura County v. Clay, 114 Cal. 242, 46 P. 9; Galloway v. Jones, 72 Cal. xxi, 13 P. 712.)

"When, as here, the jurisdiction of a court depends upon the amount in controversy, the complaint, as a whole, is to be examined to determine whether or not jurisdiction exists. Consolidated Adj. Co. v. Superior Court, 189 Cal. 92, 94, 95, 207 P. 552; Calloway v. Oro Min. Co., 5 Cal. App. 191, 194, 89 P. 1070. If under the allegations of the complaint the plaintiff is entitled to an amount equal to or in excess of the superior court's jurisdictional minimum, that court has jurisdiction of the cause even though the demand be made up of several component parts. This rule, of necessity, applies only to those cases where the total demand concerns and affects all the parties to the litigation. It is without application to a suit where several complainants, acting individually and not jointly, are seeking to enforce their respective claims against a single defendant, each claim being less than the jurisdictional minimum (Winrod v. Wolters, 141 Cal. 399, 402, 403, 74 P. 1037; Colla v. Carmichael U-Drive Autos, Inc., 111 Cal. App.[Supp.] 784, 294 P. 378), or to a case where a single plaintiff is seeking to enforce separate demands against several defendants, the amount demanded of each defendant being under the jurisdictional minimum (Myers v. Sierra Valley, etc., Ass'n, 122 Cal. 669, 55 P. 689). The complaint here involved indicates that the plaintiff is seeking from each defendant an amount in excess of the jurisdictional minimum of the respondent superior court. This being so, the cause is within its jurisdiction."

[4, 5] By analogy we conclude that the principles announced in the foregoing rule should be held to apply to each of the two groups of spouses in the instant case. The money recovered by each group is community property in which the husband and wife have present, existing and equal interests (section 161a, Civ.Code), though not equal power of management, control or disposition (sections 172, 172a, Civ.Code). To the extent that the damages recovered belong to the community and its members equally, the husband and wife are jointly and not separately interested in the total amount recovered whether the recovery be in their names jointly or individually. We therefore conclude that for the purpose of measuring the jurisdiction of the superior court the sum of the totals of the amounts sought to be recovered by each spouse should be determinative. It follows that since Mr. and Mrs. Frost sought recovery of damages in the total sum of $1,840 and Mr. and Mrs. Castle in the sum of $1,065, that the damages grew out of a single automobile accident and were recoverable from the same group of defendants, the superior court of San Diego county had original jurisdiction of the action.

We are assisted in reaching this conclusion by the case of Thomas v. Smith, 2 Cal.App.(2d) 701, 38 P.(2d) 827. That case, like this, was one in which a husband and wife sued for damages resulting from an automobile accident. The jury returned one verdict for the husband for $1,041 and another for his wife for $1,500. Separate judgments were entered on the verdicts. The defendant moved to strike the cost bill of plaintiffs on the ground that neither judgment equaled $2,000, which was the maximum of the amount recoverable in the municipal court. The motion was denied by the trial court, and its order was affirmed on appeal for the reason that, while the trial court permitted divided verdicts and judgments, the total of the separate recoveries of plaintiffs was for more than $2,000, which brought the case within the exclusive jurisdiction of the superior court. See, also, Scott v. Allen, 4 Cal.App.(2d) 621, 41 P.(2d) 371.

Appellants point out that the trial court allowed special damages in amounts greater than those alleged in the complaint; $25 was alleged as damages for medicines and care for Mrs. Frost. The trial court allowed $35. Guy O. Castle alleged damages of $15 for medicine and nursing for his wife. The trial court allowed him $35. Mrs. Castle alleged general damages of $500 with no allegation of special damages. The trial court allowed her general damages of $650 and $115 special damages.

[6] The rule governing the maximum recovery where damages are alleged in the complaint is thus set forth in Meisner v. McIntosh, 205 Cal. 11, 269 P. 612: "By the complaint the plaintiff sought to recover damages for fraudulent representations made by the defendants whereby he was induced to convey certain real property of the fair market value of $1,000. There was evidence produced at the trial to the effect that said real property was of the fair market value of $1,525. The trial court found in accordance with this evidence and rendered judgment in favor of plaintiff for this amount together with other amounts hereinafter referred to. No amendment to the complaint to conform to this evidence was made or filed. Appellants contend that as the plaintiff alleged that he was damaged only in an amount of $1,000, it was error for the court to find, and upon such finding to award a judgment, in the sum of $1,525, or in any amount exceeding the sum of $1,000. In this we think appellants are right. The authorities overwhelmingly support appellants' contention. 'The rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his bill or other pleadings.' 15 R.C.L. 604. 'A judgment cannot be properly rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint.' 33 Cor.Jur. 1164."

[7] Among the many other cases supporting this rule are Kerry v. Pacific Marine Co., 121 Cal. 564, 54 P. 89, 66 Am.St.Rep. 65; Merced Irrigation Dist. v. San Joaquin Lt. & P. Co., 220 Cal. 196, 29 P.(2d) 843; Brown v. Ball, 123 Cal.App. 758, 12 P.(2d) 28; Monterey Park, etc., Bank v. Bank of West Hollywood, 125 Cal.App. 402, 13 P.(2d) 976. This error does not require a reversal of the judgment, as we may correct it by reducing it. In making reductions, we regard the causes of actions and judgments of a husband and wife as joint.

The other questions argued by counsel do not need consideration here.

It is ordered that the judgment be and is hereby modified as follows: The portion of the judgment in favor of Bertha L. Frost is reduced by $10 to $525. The portion of the judgment in favor of Guy O. Castle is reduced by $20 to $215. The portion of the judgment in favor of Lillian Castle is reduced by $265 to $500. As so modified, the judgment is affirmed. The respective parties will pay their own costs of appeal.

I concur: JENNINGS, Acting P. J.

23 Cal.App.2d 1

McCOY v. CELESTIN.

Civ. 11530.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1937.

1. Landlord and tenant ⚿195(2)

When lessee of premises vacates them without justification, lessor may take possession thereof for tenant's benefit and relet the premises and thereafter maintain an action for the difference between the sum he has in good faith received from re-leasing the premises and the amount provided to be paid by the terms of the lease.

2. Landlord and tenant ⚿231(6)

In action for rent allegedly due under dwelling house lease in which lessor agreed to cancel lease after first six months if lessee were called out of city on business, evidence sustained finding that lessee vacated premises without justification and that lessor thereafter took possession for lessee's benefit and re-leased them for his account so as to authorize recovery by lessor of amount to be paid under terms of original lease and amount received from re-leasing.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by John R. McCoy against William E. Celestin. Judgment for plaintiff, and defendant appeals.

Affirmed.

Collins Mason and H. B. Cornell, both of Los Angeles, for appellant.

Anderson & Anderson, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover rent alleged to be due under the terms of a written lease of a dwelling house, defendant appeals.

The essential facts are these:

May 6, 1935, plaintiff and defendant entered into a written lease of plaintiff's residence located in the city of Los Angeles. The term of the lease was for one year commencing on May 10, 1935, and ending May 9, 1936, at a rental of $350 per month. Among other provisions, the lease contained the following clause: "Lessor agrees to cancel this lease after the first six months in the event that the lessee is called out of the city on business."

The first and last months' rent was paid in advance. Defendant took possession of the property and remained in possession thereof, paying the rent as agreed until on or about August 10, 1935. On or about the last date mentioned defendant notified plaintiff's secretary that he was leaving the property, requested her to have an inventory made of the furniture, and thereafter moved away from the premises.

In June, 1935, plaintiff left Los Angeles for a trip to Europe and did not learn that defendant had vacated the leased premises until his return early in September, 1935, at which time he notified defendant that he was holding the residence for his benefit and that, if he rented it, it would be for the account of defendant. Plaintiff and his wife occupied the residence, endeavoring to relet the property, which he succeeded in doing about May 19, 1936.

This is the sole question presented for our determination:

Was there substantial evidence to sustain the trial court's findings that:

(1) Plaintiff did not accept a surrender of the leased premises from defendant?

(2) Plaintiff occupied the leased premises for the period from September, 1935, until May, 1936, for the sole purpose of preserving the same and reletting it for the benefit of defendant?

(3) The leased premises were not vermin infested and rendered uninhabitable?

(4) Defendant was not not called out of the city on business during the period covered by the written lease between the parties?

This question must be answered in the affirmative. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain the findings of fact set forth, supra, and each and every other finding upon which the judgment in plaintiff's favor was necessarily predicated. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; People v. Groves, 9 Cal.App.(2d) 317, 321, 49 P.(2d) 888, 50 P.(2d) 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

[1] It is the established law in this state that, when the lessee of premises vacates them without justification, the lessor may take possession of the property for the benefit of the tenant and relet the same and thereafter maintain an action for the difference between the sum he has in good faith received from re-leasing the premises and the amount provided to be paid by the terms of the lease. Bradbury v. Higginson, 162 Cal. 602, 123 P. 797; Steel v. Thompson, 59 Cal.App. 191, 192, 210 P. 430.

[2] In the instant case there was substantial evidence to sustain the trial court's findings that defendant without justification vacated the premises leased by him from plaintiff and that plaintiff did not accept a surrender of the leased premises, but took possession of the same for the benefit of defendant and re-leased them for his account.

Applying the rule of law above stated to these facts, the trial court's judgment for the plaintiff was proper. An examination of the record in this case discloses that it is singularly free from error.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

---

22 Cal.App.2d 646

JAMESON v. GAVETT et al.

Civ. 2022.

District Court of Appeal, Fourth District, California.

Sept. 25, 1937.

1. Master and servant 🔑332(3)

In boy's action for injuries sustained when struck by stone thrown by person performing work for occupant of premises in an effort to eject boy, whether person committing assault was an employee of occupant of premises or occupied the status of an independent contractor was a question of mixed law and fact.

2. Master and servant 🔑304

A master is civilly liable for wrongful or negligent act of his servant committed while in his service and within scope of servant's employment.

3. Master and servant 🔑302(1)

An act is within "scope of servant's employment" within rule rendering master civilly liable for negligent or wrongful act of servant committed within scope of servant's employment if, at time act is committed, servant is directly engaged in duties which he was employed to perform or if act directly produces result desired by master.

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

4. Master and servant 🔑302(1)

The master is civilly liable for wrongful or negligent act of his servant committed while in his service and within scope of servant's employment whenever it may fairly be declared that the questioned act is one which indirectly or incidentally contributes to the service which the servant was employed to render, the test being whether the act was done in prosecution of business in which servant was employed to assist.

5. Master and servant 🔑302(1)

The authorization of a master to perform the act which occasions injury to a third person need not be expressly conferred to fasten liability upon master, but responsibility attaches to master if act is committed by virtue of authority which may fairly be implied from nature of employment and the duties incident thereto.

6. Master and servant 🔑330(3)

In boy's action for injuries sustained when struck by stone thrown by employee in attempting to eject boy from employers' premises, evidence sustained finding that act of employee was committed in course of his employment so as to render master liable where it was shown that employee, in addition to attempting to protect his own tools, also attempted to protect contents of building generally.

7. Master and servant 🔑302(6)

A servant may at same time be combining both his own and his master's business, and in such case the master will be liable for the servant's acts.

8. Master and servant 🔑330(3)

In boy's action for injuries sustained when struck by stone thrown by employee in attempting to eject boy from employers' premises, evidence sustained finding that employers, by their acts and conduct and with full knowledge of surrounding circumstances, ratified employee's act (Civ.Code, § 2339).

9. Master and servant ⚷308

Approval and ratification by the master with full knowledge of the surrounding circumstances may fix liability on master for an act of servant which was outside scope of employment (Civ.Code, § 2339).

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by James Jameson, by Frances Jones, his guardian ad litem, against Jack Gavett, the Standard Stove Works, and others. Judgment for the plaintiff, and the defendants other than Jack Gavett appeal.

Affirmed.

See, also, 67 P.(2d) 1072.

Lewis R. Kirby and George A. Malette, both of San Diego, for appellants.

Edward J. Kelly and Ben B. Rubin, both of San Diego, for respondent.

JENNINGS, Acting Presiding Justice.

The plaintiff here, a boy 12 years of age, brought this action through his guardian ad litem against the defendants to recover damages for personal injuries sustained by him as the result of an assault and battery committed upon him by the defendant Jack Gavett. Liability was sought to be imposed upon the defendants other than Gavett because of the alleged relationship of master and servant which existed between said defendants and Gavett and because it was alleged that the act which resulted in plaintiff's injuries was committed by Gavett in the course and within the scope of his employment. Plaintiff's complaint contained two causes of action. In the first cause of action it was alleged that the assault was maliciously committed by Gavett, and in the second it was alleged that the act was negligently done. Gavett defaulted in appearance, and there is no claim that the judgment rendered against him is not proper. Trial of the action against the other defendants was had before the court without a jury and resulted in the entry of a judgment against said defendants in the amount of $2,275. From this judgment the present appeal has been perfected.

The two contentions advanced on this appeal are, first, that the evidence produced during the trial of the action was insufficient to warrant the trial court in finding as it did that the defendant Gavett was an employee of appellants at the time the act was committed; and, second, that if it be conceded that the fact of employment was sufficiently established, the evidence was nevertheless insufficient to support the court's finding that the act shown to have been committed by Gavett was done by him in the course of his employment.

[1] With respect to the first of the above-mentioned contentions, an examination of the transcript on appeal produces the conviction that it may not be declared that there is an entire absence of any evidence to support the trial court's finding that, at the time the assault was committed, Gavett was in the employment of appellants. It may be conceded that much of the evidence which was submitted during the trial indicated that Gavett, at all times material to the present controversy, occupied the status of an independent contractor rather than that of an employee of appellants and that a judgment favorable to appellants would therefore have been sustainable. Nevertheless, the record does contain some evidence which tended to show that appellants retained the right to direct the details of the work in which Gavett was engaged, and the undisputed evidence showed that appellants retained the right to discharge Gavett at any time that his work was unsatisfactory to them. These facts, especially that of direction as to details, are strongly indicative of the right of control which is the essential element of the relationship of master and servant. The question of whether Gavett was a mere employee of appellants at the time of the assault or whether he then occupied the status of an independent contractor was one of mixed law and fact and, the trial court having resolved the matter in respondent's favor upon evidence that was conflicting, the criticized finding may not be disturbed. Hillen v. Industrial Acc. Comm., 199 Cal. 577, 250 P. 570; Chapman v. Edwards, 133 Cal.App. 72, 24 P.(2d) 211.

The second contention of appellants requires some reference to the circumstances surrounding the assault as these facts were developed by the evidence produced during the trial of the cause.

On June 8, 1935, Jack Gavett was engaged in the work for which he was employed on the premises occupied by the Standard Stove Works. On these premises there were two buildings which were approximately 50 feet distant from each other. The larger building, which was about 200 feet long and 50 feet wide, was used for the assembling of stoves which were repaired and rebuilt. The smaller building was used for the storage of materials and tools and also contained a sand-blasting machine. Some of the tools that were owned by Gavett and employed by him in the work which he performed were in this latter building. Immediately prior to the assault Gavett was in the larger building. At this time he saw two boys enter the other building. He immediately shouted to them to leave. They obeyed. The respondent, who had preceded the two other boys into the building, remained. Gavett, after again shouting to respondent to leave, picked up some stones and threw them toward the building in which respondent remained. One of the missiles thus thrown by Jack Gavett struck respondent on his head, causing the injuries for which he demanded compensation. Gavett, who was called as a witness by respondent under section 2055 of the Code of Civil Procedure, testified that, prior to June 8, 1935, he had heard other persons employed about the premises, including the appellant Seneca, order boys to leave the building in which the sand-blasting machine was located; that he knew that Seneca desired that boys be kept away from the premises; that he had seen boys breaking windows of the building and stealing parts used in the rebuilding of stoves from the building; and that he knew tools had been stolen from said building. The witness further testified that he ordered the boys to leave the building on June 8, 1935, because he wished to protect the contents of the building, including his own tools which were there, and that his purpose in throwing the stones in the direction of the building on the above-mentioned date was to frighten the respondent and cause him to leave the building. The appellant L. H. Lofgren, who was called as a witness by respondent, testified that when appellants first moved to the premises where the assault occurred they had considerable difficulty with trespassers who broke windows and stole equipment and that they subsequently caused signs to be put up warning trespassers to keep out; that these notices were installed by the persons who worked on the premises, including Gavett; that trespassers were quite a nuisance around the premises, so much so that it became necessary for the witness to drive them away several times a week; that Gavett had informed him that things had been lost or broken around the premises and he had told Gavett that appellants had notified the police but failed to obtain cooperation from them; and that he knew Gavett was attempting to keep trespassers away from the premises and had been informed by Gavett many times that Gavett had driven people away from the building. This witness further testified that he was not on the premises when the assault occurred and that he discussed the matter with Gavett on the day following the assault, at which time he said nothing by way of disapproval of the assault, and that, after the occurrence of the assault, Gavett remained in the employment of appellants doing the same sort of work for a period of approximately ten months.

[2-5] The foregoing recital of facts extracted from the transcript on appeal furnishes a sufficient answer to appellants' second contention. The rule is settled that the master is civilly liable for the wrongful or negligent act of the servant committed while in his service and within the scope of the servant's employment. Stephenson v. Southern Pac. Co., 93 Cal. 558, 561, 29 P. 234, 15 L.R.A. (N.S.) 475, 27 Am.St.Rep. 223. In considering whether or not a particular act is within the scope of the servant's employment, no difficulty is encountered in arriving at the conclusion that the servant is within the course of his employment if at the time the act is committed the servant is directly engaged in the duties which he was employed to perform or if the act directly produces the result desired by the master. The principle has, however, been extended to fasten liability upon the master when it may fairly be declared that the questioned act is one which indirectly or incidentally contributes to the service which the servant was employed to render. Kish v. California State Automobile Ass'n, 190 Cal. 246, 249, 212 P. 27; Hall v. Puente Oil Co., 47 Cal.App. 611, 191 P. 39; Bleser v. Thomas Haverty Co., 3 Cal.App.(2d) 199, 204, 38 P.(2d) 873. As was said in Chamberlain v. Southern California Edison Co., 167 Cal. 500, at page 506, 140 P.

25, 27: "The test is whether the act was done in the prosecution of the business in which the servant was employed to assist. If it was, the master is responsible." Furthermore, the authorization of the master to perform the act which occasions injury to a third person need not be expressly conferred in order to fasten liability upon the master. Responsibility attaches to the master if the act is committed by virtue of authority which may fairly be implied from the nature of the employment and the duties incident thereto. Nussbaum v. Traung Label & Lithograph Company, 46 Cal.App. 561, 189 P. 728; Curcic v. Nelson Display Co. et al. (Cal.App.) 64 P.(2d) 1153.

[6, 7] Application of the aforesaid established principles to the above-mentioned facts impels the conclusion that the act of the employee, Gavett, in throwing the stone was committed by him in the prosecution of the business in which he was employed to assist and that authorization to commit the act may fairly be implied from the nature of Gavett's employment and the duties incident thereto. The evidence was ample to show that the assault committed upon respondent was not perpetrated by the servant solely on his own account and entirely for the purpose of protecting his own tools which were in the building where respondent was at the time the missile was thrown. Gavett's testimony indicated that his purpose in throwing the stone was not only to safeguard his tools but also to protect the contents of the building generally. A servant may at the same time be combining both his own and his master's business and in such case the master will be liable for the servant's acts. 18 R.C.L. p. 797; Hiroshima v. Pacific Gas & Electric Co. (Cal.App.) 63 P.(2d) 340.

[8, 9] It may further be noted that the evidence showed that appellant Lofgren knew that Gavett had installed some of the signs warning trespassers to keep off the premises and had been informed by Gavett that the latter had driven trespassers from the building wherein the sandblasting machine and materials were stored. Still more significant is the testimony of the witness Lofgren to the effect that on the day following the assault he had discussed the matter with Gavett and that he had then expressed no disapproval of the act and that Gavett had remained in appellants' employment for approximately ten months after the assault was committed. This undisputed evidence was ample to warrant the trial court in concluding that appellants had by their acts and conduct and with full knowledge of the surrounding circumstances ratified the act which produced the injuries. It is settled that approval and ratification by the master with full knowledge of the surrounding circumstances may fix liability upon the master for an act of the servant which was outside the scope of employment. Section 2339, Civ.Code; Sullivan v. People's Ice Corp., 92 Cal.App. 740, 268 P. 934; 2 American Jurisprudence p. 279; 18 R.C.L. p. 801.

The judgment is affirmed.

I concur: MARKS, J.

---

22 Cal.App.2d 582

CHRISTY v. DRAPEAU, Building and Loan Com'r.

Civ. 10424.

District Court of Appeal, First District, Division 2, California.

Sept. 23, 1937.

1. Building and loan associations ⇨42(3)

An offer to purchase realty from state building and loan commissioner was not accepted, where letter to offeror, from manager of real estate sales department stated that offer had been approved by committee, subject to receipt of better offer, and did not state that it was notice of acceptance of offer, and such manager's authority to accept offer was not shown.

2. Building and loan associations ⇨42(3)

An offer to purchase realty from state building and loan commissioner did not ripen into binding unilateral contract supported by sufficient consideration, in absence of evidence that offer was acted on by commissioner.

3. Building and loan associations ⇨42(3)

An offer to purchase realty from state building and loan commissioner was subject to revocation or withdrawal during period for which offeror agreed to keep it open, where no consideration for such promise moved to offeror.

4. Building and loan associations 🔑42(3)

One withdrawing his offer to purchase realty from state building and loan commissioner before latter acted thereon was not vendee in default and hence not precluded from recovering deposit made by him.

5. Building and loan associations 🔑42(3)

A provision in offer to purchase realty from state building and loan commissioner for retention of offeror's initial deposit by commissioner as liquidated damages, if sale were not consummated because of offeror's fault, was unenforceable, where offer was never accepted and no appeal was taken from court order dismissing commissioner's petition to authorize sale to offeror after withdrawal of offer, commissioner never being in position to tender conveyance and place offeror in default.

6. Judgment 🔑486(1)

The District Court of Appeal cannot go behind face of superior court's order, dismissing state building and loan commissioner's petition for authority to sell realty to one whose offer to purchase had been withdrawn before acceptance thereof, and enforce provision in offer for retention of offeror's initial deposit as liquidated damages, if sale were not consummated because of his fault, on ground, not apparent on face of order, that petition was dismissed because of offeror's fault, in collateral attack on order by commissioner as defendant in offeror's action to recover deposit.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Robert E. Christy against Louis C. Drapeau, as Building and Loan Commissioner of the State of California. Judgment for plaintiff, and defendant appeals.

Affirmed.

Walter Carrington, of Oakland, for appellant.

Robinson, Price & Macdonald and Robert W. Macdonald, all of Oakland, for respondent.

STURTEVANT, Justice.

The trial court made findings in favor of the plaintiff and ordered judgment thereon in an action brought to recover a deposit. The defendant has appealed and has brought up a bill of exceptions. The latter document discloses no dispute regarding facts, and the only questions involved are questions of law. The bill of exceptions discloses a stipulation which refers to certain lines and pages of written instruments offered in evidence. The exhibits have not been brought up, and said references mentioned in the printed bill of exceptions are of little help in ascertaining the passages referred to.

In his complaint, the plaintiff alleged in hæc verba a written offer. Those allegations were not denied by the defendant. In so far as it is material to anything we will say, the offer was as follows (the Roman numerals are ours):

I. "Offer to Purchase Real Property
"Real Estate No. 1138, Date November 19, 1935

"The undersigned Offeror hereby offers and agrees to purchase from Louis C. Drapeau, as Building and Loan Commissioner of the State of California, in the liquidation of California Mutual Building & Loan Association, the following described property located in the County of Alameda, State of California, towit: [Legal Description of No. 400 Perkins Street in Oakland.]———

II. for a total purchase price of $210,000.00, payable as follows:———

III. *"I understand and agree that the acceptance of this offer by you will be subject to the approval of the Superior Court of the county in which the principal place of business of said association is located.*

IV. "My offer herein is made with full knowledge that the above described property, if acquired by me, will be subject to:

V. "1. Covenants, conditions, restrictions, reservations, rights, rights of way and easements of record, if any.

VI. "2. Assessments and bonds of record with an unpaid balance of not more than $———, with no delinquencies thereon.

VII. "3. All taxes, bonds, and assessments levied or assessed subsequent to date hereof.

VIII. "4. I am to pay recording charges and $5.00 buyer's escrow fee. Taxes for the fiscal year 1935 to 1936, rents, interest and fire insurance (coverage in the sum of $———) are to be prorated as of the date of close of escrow. This offer shall be void unless accepted and approved within sixty days after the date hereof.

IX. "I have examined and investigated the said property and improvements, and I accept the same in their present condition. If the sale of this property is not consummated by reason of any fault of mine, I understand and agree that my initial deposit is to be retained by you as liquidated damages. I further authorize you in the event this offer is accepted by you and approved by the Superior Court, to complete the said sale in accordance with the terms and provisions of this offer. In the event that any further instructions from me shall be necessary, I agree to immediately enter the same with your Escrow Department upon demand.

X. "At the time the deed to the property is recorded a policy of title insurance in an amount not to exceed the purchase price is to be furnished and paid for by purchaser.

XI. "In the event that this offer is accepted and approved all agreements and the deed are to be executed in the name of:———

"Robert E. Christy
"1100 Bay Street, Alameda
(Residence Address)

* * *

XII. "The undersigned Offeree hereby accepts the foregoing offer and agrees to the sale of the above described property on the terms and conditions herein set forth, subject, however, to the approval of the Superior Court.

"Dated at Oakland, California, ———, 1935.

"Louis C. Drapeau,
"Building and Loan Commissioner of the State of California, in the liquidation of
"California Mutual Building & Loan Association.
"By ————
"Special Deputy

XIII. "Sale recommended by:
"————
"Real Estate Department ———"

On November 19, 1935, the plaintiff signed the above instrument and delivered it to D. V. Jordan a real estate broker acting for the building and loan commissioner. At the same time plaintiff delivered to Jordan a check, $5,000, payable to the California Mutual Building & Loan Association. On November 22, Fred E. Lundberg, special deputy for the building and loan commissioner, added to paragraph XII. "* * * of the County of Santa Clara and subject to a better offer being received," and thereupon signed the same. Neither such change nor signing was done in the presence of the plaintiff and the plaintiff had no knowledge thereof except as follows. On the same date C. N. Sheets, manager of the real estate sales department, wrote to the plaintiff a letter stating: "Your offer to purchase the above property for $210,000 in cash has been *approved by the committee* subject to the approval of the Superior Court of the County of Santa Clara *and subject to a better offer being received.* The papers will be prepared for petitioning the court for its approval of the transaction." (Italics ours.) Said letter was delivered on the same date to the plaintiff. On November 23, 1935, the defendant filed a petition in the superior court of the state of California, in and for the county of Santa Clara, asking for authority to sell the real estate. On November 30, 1935, plaintiff caused to be delivered to Fred E. Lundberg, special deputy of the building and loan commissioner, the following letter addressed to the defendant: "Mr. R. E. Christy hereby withdraws the offer heretofore made to you to purchase the property at 400 Perkins Street, Oakland, California, and hereby demands the return of the $5,000 deposit made with you." The hearing of the petition was had on December 2, 1935. The courtroom clerk made a minute entry reciting that Walter Carrington, Esq., appeared as counselor for petitioner; that Willard Rice was examined as a witness, and that Robert E. Christy, through his representative, informed the court that he had withdrawn his offer, "* * * and the court being fully advised in the premises makes its order permitting said Robert E. Christy to withdraw said offer of purchase." On January 17, 1936, a nunc pro tunc order was made as follows: "The petition of the Building and Loan Commissioner for an order authorizing the sale of certain real property to Robert E. Christy coming on regularly before the court for hearing, the description of said property being fully set forth in the petition of said Building and Loan Commissioner on file herein numbered 7122; Walter Carrington, Esq., appearing as attorney for petitioner and Robert W. Macdonald of Robinson, Price & Macdonald appearing as attorney for Robert E. Christy; Willard Rice is sworn and examined as a witness for said Building and Loan Commissioner; and the court being fully advised in the premises makes its order dismissing said petition to sell." No appeal was taken from the order made December 2, 1935, nor from the order dated January 17, 1936.

[1] The defendant contends he had the power to, and did, accept plaintiff's offer. The latter replies that, under the facts hereinabove set out, the defendant never accepted the plaintiff's offer, that any purported acceptance was not communicated to plaintiff before he withdrew his offer, and that the purported acceptance, if any, added a new condition to the plaintiff's offer and was therefore no acceptance. Each reply is sufficient. The offer as made contemplated that it was subject to being "recommended" by a representative of defendant's real estate department. (Paragraph XIII.) Mr. Sheets' letter could be construed to be such recommendation. The offer as made was not subject to be "approved by the committee" or any committee. If Mr. Sheets' letter meant that it was, then his letter was an attempt to change the offer. If his letter purported to be a notice of acceptance, it did not so state. Mr. Sheets was neither principal nor a duly appointed deputy, nor was there any showing made that he had authority to accept any offer on behalf of the defendant. Finally, his letter added "and subject to a better offer being received," a new condition not contained in the offer as made. It follows that plaintiff's offer was never accepted.

[2] In his next point the defendant states the offer to purchase, after being acted upon by defendant, ripened into a binding contract unilateral in character and supported by a sufficient consideration. The contention may not be sustained. As we have just shown, the evidence did not support the claim that plaintiff's offer was acted upon by defendant.

[3] It is next asserted that the plaintiff agreed his offer was to remain open for sixty days (paragraph VIII), and therefore it could not be revoked or withdrawn during that period. In support of the point the defendant cites Marsh v. Lott, 8 Cal.App. 384, 97 P. 163, and other cases which hold that an offer to remain open a fixed time, and which is made upon a valuable consideration, may not be revoked by the person making the offer during the time so agreed upon. But the vice of the contention in the instant case is that no consideration whatever moved to the plaintiff.

[4] It is next contended that the plaintiff, by his attempted withdrawal after his offer was acted upon by defendant, was a vendee in default, and as such cannot recover any or all of his deposit. As shown above, the plaintiff's offer was never acted upon by the defendant and there was no evidence he was at any time in default. Tomboy Gold & Copper Co. v. Marks, 185 Cal. 336, 197 P. 94, is relied upon by the defendant. In that case no option or offer was involved. A sale in præsenti was agreed upon. The delivery of the subject of the sale was postponed and deferred payments were to be made.

On each of the foregoing propositions the trial court made findings in favor of the plaintiff and against the defendant. Each finding was clearly supported by the evidence introduced at the trial. Those portions of the evidence which are recited above we think clearly support our statement.

[5, 6] It is finally contended by the defendant that the term "liquidated damages" in the offer to purchase does not affect the enforceability of the provision in the offer (paragraph IX): "If the sale of this property is not consummated by reason of any fault of mine I understand and agree that my initial deposit is to be retained by you as liquidated damages." The defendant concedes the clause regarding liquidated damages is vulnerable. He cites Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, and asserts that the plaintiff, under the facts, was a vendee in default. However, he does not bring himself within the authority that he relies upon. His offer to purchase was never accepted; therefore the case does not involve the relation of vendor and vendee. In this connection we appreciate it is the contention of the defendant that the superior court of Santa Clara county dismissed the petition because of the fault of the plaintiff. That fact does not appear on the face of the order of dismissal. In this collateral attack we may not go behind the face of that order. If the defendant was of the opinion that the superior court of Santa Clara erred, he should have taken an appeal from the order; but,

as the instant case now stands, without fault of the plaintiff the defendant failed and neglected to obtain permission to make the transfer. That being so, the defendant has never been in position to tender a conveyance and place the plaintiff in default and he has not done so.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: SPENCE, Acting P. J.; GRAY, Justice pro tem.

---

23 Cal.App.2d 13

PEOPLE v. ROSEBERRY et al.

Cr. 3015.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1937.

Hearing Denied by Supreme Court Oct. 28, 1937.

Gaming 🔑98(5)

Evidence that defendant was codefendants' employer and that defendant possessed a key fitting lock of rear door of room allegedly kept or occupied with paraphernalia for recording bets in violation of statute was sufficient to support finding that defendant "kept" or "occupied" room and to sustain conviction therefor (Pen.Code, § 337a, subd. 2).

> The word "keep" means to conduct or carry on; to maintain, as an establishment, institution or the like; to manage; continue. The word "occupy" means to take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in.
>
> [Ed. Note.—For other definitions of "Keep," "Occupied" and "Occupy," see Words & Phrases.]

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Eldon Roseberry, Murray Clewell, and another were convicted of keeping or occupying a room with books, papers, or paraphernalia for purpose of recording or registering bets in violation of section 337a, subd. 2, of the Penal Code, and Murray Clewell appeals.

Affirmed.

George H. Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant was charged with the offense denounced by section 337a, subdivision 2, of the Penal Code. From a judgment of conviction of such offense, this appeal is taken. The case was tried by the court, without a jury, upon the evidence taken at the preliminary examination.

The sole question presented for decision is this: Was there any substantial evidence to sustain the judgment of conviction?

Section 337a, subdivision 2, of the Penal Code, prohibits any person from keeping or occupying any room, etc., "with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet," etc. It is contended that there was no substantial evidence to show that defendant kept or occupied a room within the meaning of the statute. The word "keep" is defined as follows: "To conduct or carry on; to maintain, as an establishment, institution, or the like; to manage; continue." Webster's New International Dictionary, 1921. The word "occupy" is defined as follows: "To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in." Id.

Viewing the evidence in the light most favorable to the prosecution, there is no dispute as to defendant's presence in the room and his apparent intimacy with the patrons and with his codefendants. It further appears from the testimony of one of the arresting officers that the other defendants stated that Clewell was their employer, which the latter denied. No objection was made to the introduction of this hearsay evidence and no evidence to rebut this testimony was offered by defendant. As heretofore stated the case was tried upon the evidence taken at the preliminary examination. Furthermore, it appeared that defendant had in his possession a key which fitted the lock in the rear door of the room and which he requested the arresting officers to permit him to retain. Considerable importance must be attached to the fact that the key found in defendant's possession was one which would fit the lock of the rear door of the room which defendant was charged with having kept or occupied. People v. Parkinson, 138 Cal.App. 599, 611, 33 P.(2d) 18. From the foregoing, the inference may fairly be drawn that defendant conducted, maintained, managed, possessed, tenanted, or did business in the room in question in the manner denounced by the Penal Code. We conclude, therefore, that there was some substantial evidence of the fact. That he did so was the implied finding of the trial court and we cannot now disturb such finding. People v. Tedesco, 1 Cal.(2d) 211, 219, 34 P.(2d) 467.

In accordance with the foregoing opinion, the judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

---

22 Cal.App.2d 589

PEOPLE v. BOYLE et al.

Cr. 3013.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1937.

1. Criminal law 🔑1144(3)

On appeal from a judgment and order denying a new trial to accused in a criminal prosecution, the evidence will be viewed most favorably to the prosecution.

2. Jury 🔑110(1)

Accused may waive his right to question prospective jurors and to exercise peremptory challenges allowed him.

3. Jury 🔑110(1)

Where accused, relying on agreement with district attorney's office that accused would be permitted, if agreeable to court, to plead guilty to second degree robbery, failed to examine jurors or exercise any peremptory challenges, right to examine jurors and exercise peremptory challenges was waived, notwithstanding trial court refused plea of guilty to second degree robbery.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Clifford Boyle and others were charged with an offense and James Johnson was convicted of robbery in the first degree, and he appeals.

Affirmed.

William W. Larsen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of robbery in the first degree. This appeal is from the judgment and order denying his motion for a new trial.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts are these:

March 27, 1937, defendant and two associates armed with a deadly weapon entered Joseph Haston's store in the city of Los Angeles and took from his cash drawer approximately $45.

Prior to the time the case was called for trial, defendant's attorney had a tentative agreement with the district attorney's office that in consideration of defendant's testifying against his codefendants he would be permitted, if agreeable to the court, to enter a plea of guilty to second degree robbery. After the jury had been impaneled and defendant's counsel had failed to examine the jurors or exercise any peremptory challenges, it developed that the trial court would not accept defendant's plea of guilty to robbery in the second degree. Defendant then made a motion to have the jury discharged, which was denied.

This is the sole question presented for our determination:

Was defendant deprived of his right to examine the jurors and to peremptorily challenge them?

[2, 3] This question must be answered in the negative. It is settled that a defendant in a criminal case may waive his right to question prospective jurors and to exercise the peremptory challenges allowed him by law. This defendant did in the instant case. The affidavit of his attorney on a motion for a new trial reads in part as follows: "that on the day of the trial at the time the jury was being impaneled Richard A. Haley, as attorney for the defendant James Johnson, waived all right

to examine the jury for cause and waived all peremptory challenges upon the assumption that the said James Johnson would plead guilty to second degree robbery."

The fact that defendant's counsel was motivated by the belief that his client would be permitted to plead guilty to second degree robbery is immaterial, as he was undoubtedly aware that any such plea must first meet with the approval of the judge presiding at the trial.

No errors appear in the record.

Therefore, the judgment and order appealed from are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

---

22 Cal.App.2d 725

PEOPLE v. MILLS.

Cr. 2978.

District Court of Appeal, Second District, Division 1, California.

Sept. 29, 1937.

Hearing Denied by Supreme Court Oct. 28, 1937.

1. Criminal law 🔑274, 993

Where accused pleaded guilty to information charging him with having issued checks without sufficient funds, questions raised by motion to set aside plea of guilty and be permitted to enter a plea of not guilty and motion to modify the judgment were addressed to discretion of trial court.

2. Criminal law 🔑274

Where it was not shown that accused was a victim of fraud, duress, or designing influence as a result of which he was induced to enter plea of guilty to an information charging him with having issued checks without sufficient funds, and plea was attributed to accused's state of mind, discretion of trial court in denying motion to set aside the plea of guilty and enter plea of not guilty was not abused.

◆

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Homer C. Mills pleaded guilty to an information charging him with having issued checks without sufficient funds, and was sentenced to penitentiary. From an order of the court denying a motion to set aside the plea of guilty and be permitted to enter a plea of not guilty, and denying motion to modify the judgment, defendant appeals.

Affirmed.

G. L. Rockwell, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

DORAN, Justice.

Defendant herein was charged by information with five counts of issuing checks without sufficient funds, felonies, and on December 8, 1936, entered a plea of guilty to count 1 of the information. Permission was granted to file an application for probation. Time for the hearing on the application for probation and the pronouncing of judgment and sentence was set for December 18, 1936; however, on that date, due to illness of counsel, the matter was continued to February 5, 1937, at which time the application for probation was denied and defendant was sentenced to the penitentiary. A thirty-day stay of execution was granted. On March 11, 1937, defendant appeared in court and made two motions—one to set aside the plea of guilty and to be permitted to enter a plea of not guilty, which motion was denied; thereupon defendant made a motion to modify the judgment, in connection with which motion the court was requested to "give this defendant a suspended county jail sentence." This motion was also denied.

Defendant appeals from the order denying the two motions on the ground that the court abused its discretion in denying the same.

The verified petition supporting the motion to modify the judgment, in the lower court, set forth four grounds as the basis of the motion: namely, "1. That the Court abused its discretion in determining that defendant was not entitled to probation; 2. That the Court abused its discretion in determining that the crime to which defendant plead guilty constituted a felony instead of a misdemeanor; 3. That the report of the probation officer upon which the Court acted, was in many respects incomplete, misleading, and contrary to the facts; 4. That said probation officer concealed from the Court important facts which were material to the proper consideration of defendant's cause; and that said Court relied and acted upon said report and the Court was deceived and misled thereby to the prejudice of the defendant." The same claims are reasserted on appeal, in addition to which it is further contended, in substance, that appellant is not guilty of the crime charged; that the transaction was civil in its nature and not criminal; that the court failed in its duty to make proper inquiry before pronouncing judgment; that the trial court should have dismissed the case on its own motion in the interests of justice; and that it ruled contrary to law with respect to other contentions then and there urged by defendant.

No fraud, duress, or other fact which might have affected the will and judgment of the defendant at the time of entering the plea of guilty is alleged. Appellant's reason for having pleaded guilty, as set forth in his verified petition, was that he "only plead guilty to said charge, because he was worried and harassed on financial matters and the pending charges, and was led to believe that if he plead guilty he would be allowed probation and could go forward with his business operations without further hindrance or controversy." However, no fact is alleged in defendant's verified petition as to how he was "led to believe that if he plead guilty he would be allowed probation." In further support of appellant's contention that the court abused its discretion in the manner hereinbefore outlined, it is urged that appellant "has a good reputation, never before having been convicted of a crime, except he inadvertently plead guilty to a misdemeanor charge pending in another county, due to the fact that he was supplied with wrong and incorrect data by his former attorney." It should be noted in this connection that, at the time defendant pleaded guilty in the instant case, he was not represented by the same lawyer who later appeared to urge the motions. At the hearing on the motions above mentioned, defendant's then counsel asserted that "defendant, *upon the advice of counsel,* and through inadvertency, because of his harassed state of mind, and ill health, pleaded guilty" (italics added); incidentally, it should be further noted that the defendant himself is an attorney at law. The trial judge was not bound to believe the defendant's declarations or to rule on the conflicting contentions otherwise than his best judgment dictated.

[1, 2] It appears from the record that all of the matters presented by the appeal herein, properly applicable, were submitted to the trial court in the two motions made after judgment. The questions raised by the motions were addressed to the sound discretion and judgment of the trial court, and appellant presents nothing by the appeal herein that indicates either an error of judgment or an abuse of discretion. The cases relied upon by appellant (for example, People v. Grant, 97 Cal.App. 60, 274 P. 1005, 275 P. 838) are not in point. As hereinbefore stated, in substance, appellant does not contend that he was the victim of fraud, duress, or designing influence, as the result of which he was induced to enter a plea of guilty, but attributes the plea to his own state of mind. There is nothing in the record to justify a conclusion that the trial court abused its discretion.

With respect to the procedure that was followed as to the matters herein discussed, no question was raised by respondent as to whether the judgment, at the time the motions were made, had become final, nor were the validity and propriety of said motions disputed, nor, also, in that connection, was the question raised as to whether the court in the face of the record had power to enter any order at all that would affect the judgment. Such questions, are, therefore, not decided; but nevertheless the opinion herein is not to be construed as an expression of approval of the procedure followed.

For the reasons hereinbefore given, the order appealed from is affirmed.

We concur: HOUSER, P. J.; YORK, J.

22 Cal.App.2d 604

Ex parte FALCONI.

Cr. 1578.

District Court of Appeal, Third District, California.

Sept. 23, 1937.

1. Criminal law ⚷1216(1)

Prisoner was entitled to credit on term of imprisonment for time during which he was lawfully at liberty on parole, but was not entitled to credit for period of time during which he unlawfully remained away from prison after revocation of his parole, since during such period of absence prisoner was deemed a fugitive from justice.

2. Criminal law ⚷1216(1)

One may not claim the benefit of the running of a sentence of imprisonment while he willfully remains outside the prison without sanction of prison authorities and while he is a fugitive from justice.

3. Pardon ⚷14

Requirement that paroled prisoner report periodically to parole officer as condition of parole is a valid exercise of authority by prison board.

4. Pardon ⚷14

Requirement that paroled prisoner report periodically to parole officer was a part of the rules and regulations of the prison, a breach of which authorized the prison board to revoke his parole.

◆

Proceeding in the matter of the application of Frank Falconi for a writ of habeas corpus.

Writ denied.

Frank Falconi, in pro. per.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Upon habeas corpus the petitioner seeks to be discharged from custody on the theory that his term of imprisonment has been fully served. Upon conviction of the crime of robbery the petitioner was committed June 25, 1917, to state prison at San Quentin, and later transferred to Folsom, for a term of twenty years. September 28, 1926, he was released on parole, subject to certain specified terms and conditions, among which was the requirement that he report periodically. For failure to comply with the conditions fixed by the prison board, his parole was revoked January 14, 1928. The petitioner failed to present himself for imprisonment at the state prison to complete his sentence after the termination of his parole, but continued to remain at large until September 14, 1930, when he was apprehended and again imprisoned. The prisoner remained at large two years and eight months after his parole was revoked before he was returned to state prison.

It is contended the petitioner is entitled to be discharged from custody because more than twenty years have elapsed since his commitment June 25, 1917, and that the prison board was without legal authority to suspend his parole or revoke his credits for violation of parole conditions occurring outside of the state prison for the reason that such conditions were not a part of the "rules and regulations of the prison."

[1, 2] The petitioner has not fully served the term for which he was committed to state prison, and is therefore not entitled to be discharged from custody. In computing the term of imprisonment which has been served, the petitioner is entitled to credit for the time between September 28, 1926, and January 14, 1928, during which he was lawfully at liberty on parole. In re Forbes, 108 Cal.App. 683, 292 P. 142. After his parole was revoked on January 14, 1928, it was his duty to immediately present himself to the prison authorities at Folsom to complete his sentence of imprisonment in that institution. He is not entitled to credit upon the term of his sentence for that period of time from January 14, 1928, to September 14, 1930, during which he unlawfully remained away from Folsom state prison after the revocation of his parole. During the last-mentioned period of time the petitioner is deemed to have been a fugitive from justice. In in Re Sommers, 135 Cal.App. 541, 27 P.(2d) 649, it is said in that regard:

"After the petitioner's parole was revoked October 29, 1927, it became his duty to present himself to the prison authorities at Folsom to complete his sentence of imprisonment in that institution. He had then served but three years of his term. He thereafter willfully absented himself from that prison, and thereby became a fugitive from justice. One may not claim the benefit of the running of a sentence of imprisonment while he wilfully remains outside the prison without the sanction of the prison authorities and while he is a fugitive from justice. In re Forbes, 108 Cal.App. 683, 292 P. 142."

[3, 4] The condition imposed by the prison board upon the parole of the petitioner requiring him to report periodically to the parole officer was a valid exercise of authority. It was a part of the rules and regulations of the prison, a breach of which authorized the prison board to revoke his parole. In re Taylor, 216 Cal. 113, 13 P. (2d) 906; Ex parte Stanton, 169 Cal. 607, 147 P. 264.

The writ is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

* * *

22 Cal.App.2d 629

LUCY v. LUCY.

Civ. 10314.

District Court of Appeal, First District, Division 2, California.

Sept. 24, 1937.

Hearing Denied by Supreme Court Nov. 22, 1937.

1. Assumpsit, action of ⇨6(1)

A common count will not support action based on express contract so long as contract continues executory; but, when contract has been executed on plaintiff's part, and nothing remains but payment of price in money by defendant, which is nothing more than law would imply against defendant, plaintiff may declare generally, using common counts, or may declare specially on original contract, at his election.

2. Executors and administrators ⇨421

In action against executrix for balance allegedly due for work and labor performed for testator, where claim stated that testator agreed to pay sum sued for and that such sum was reasonable value of services, plaintiff could declare generally, using common counts, or specially on original contract, at his election.

3. Pleading ⇨404

Point not presented by demurrer or answer was waived (Code Civ.Proc. § 434).

4. Partnership ⇨140

Partner who employs another to perform his duties, not partnership, is liable for services so performed.

5. Witnesses ⇨178(3), 275(5)

In action against executrix for work done for testator, executrix had right to cross-examine plaintiff as to any question propounded to plaintiff on direct examination; but if, in cross-examining, she elicited new material matters which occurred before testator's death, executrix waived statutory privilege (Code Civ.Proc. § 1880, subd. 3).

6. Witnesses ⇨165

In action against executrix for work done for testator, plaintiff's testimony identifying books of account of firm in which testator was partner and handwritings therein contained *held* properly received (Code Civ. Proc. § 1880, subd. 3).

7. Appeal and error ⇨1050(1)

In action against executrix for work done for testator, plaintiff's testimony as to his employments and occupations and compensation received from other employers *held* not prejudicial to executrix (Code Civ.Proc. § 1880, subd. 3).

8. Witnesses ⇨178(3)

In action by testator's son against executrix for work done for testator, cross-examination of plaintiff as to presents and support received from testator *held* to develop new matter and prima facie defense under statute, so as to waive statutory privilege and authorize redirect examination of plaintiff as to his arrangements with testator and promise of testator to pay plaintiff compensation (Civ.Code, § 210; Code Civ.Proc. § 1880, subd. 3).

9. Appeal and error ⇨1048(6)

In action by testator's son against executrix for work done for testator, where executrix cross-examined plaintiff as to presents and support received by plaintiff from testator, so as to make out prima facie defense under statute, excluding redirect testimony of plaintiff showing promise of testator to pay plaintiff compensation *held* prejudicial error (Civ.Code, § 210; Code Civ.Proc. § 1880, subd. 3).

10. Trial ⇨396(2)

In action against executrix for work done for testator, where answer did not deny allegation that plaintiff had not been paid, finding that plaintiff had been paid *held* error, in view of rule that matters not put in issue by pleadings should not be found upon.

11. Appeal and error ⟹1177(5)

On appeal of plaintiff in action against executrix for work done for testator, although improper exclusion of evidence authorized reversal, record *held* not to entitle plaintiff to have reviewing court order judgment in plaintiff's favor.

◆

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Harold Lucy against Dorothy Lucy, as executrix of the last will and testament of George D. Lucy, also known as G. D. Lucy, deceased. Judgment for defendant, and plaintiff appeals.

Reversed.

William M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco (Henry A. Plattner, of San Francisco, of counsel), for appellant.

Thomas S. Molloy, of San Francisco, for respondent.

STURTEVANT, Justice.

Prior to 1926 George D. Lucy and Ben Lucy were partners doing business under the firm name of G. R. Lucy & Company. In 1926 Ben Lucy died. After his death George D. Lucy carried on the business. On November 16, 1933, George D. Lucy died. Shortly thereafter this defendant, Dorothy Lucy, was appointed executrix of the last will and testament of George D. Lucy, deceased.

In due time, after the appointment and qualification of the defendant as such executrix, the plaintiff presented to her a claim in the sum of $10,141.61 for the balance claimed to be due him for work and labor performed for George D. Lucy. In his claim the plaintiff stated that decedent agreed to pay said sum and that it was the reasonable value of said services. The executrix rejected the claim, and thereafter the plaintiff commenced this action. The charging portion of the plaintiff's complaint is as follows: "On the 16th day of November, 1933, George D. Lucy also known as G. D. Lucy was indebted to the plaintiff in the above-entitled action in the sum of ten thousand one hundred forty-one and 61/100 dollars ($10,141.61) for work and labor performed and services rendered to said George D. Lucy also known as G. D. Lucy, at the special instance and request of said George D. Lucy also known as G. D. Lucy, for which he agreed and promised to pay plaintiff said sum of ten thousand one hundred forty-one and 61/100 dollars ($10,141.61) which is the reasonable value thereof." The defendant did not demur. However, in due time she appeared and answered. In her answer she inserted numerous denials and also pleaded the statute of limitations, but she did not set forth any other defenses. The action was tried before the court sitting without a jury. After the plaintiff rested, the defendant made a motion to strike out testimony. It was denied. She also asked permission to file an amended answer pleading the existence of a partnership after the death of Ben Lucy between George D. Lucy and Emma M. Lucy, the widow of Ben Lucy, and that George D. and Emma M. Lucy transacted business under the name of G. R. Lucy & Company. That motion was denied and thereafter the court ordered judgment in favor of the defendant. From that judgment the plaintiff has appealed.

[1-4] Before taking up the points made by the plaintiff, we think it is best to dispose of two points presented by the defendant. The first one is that according to her contention the plaintiff's complaint did not state a cause of action. She quotes: "Where an action is based on an express contract, it may be stated as a general rule, that a common count will not support the action, but that the plaintiff must declare specially on the contract." 3 Cal.Jur. 382. It will be freely conceded that such is the general rule but it is not without exceptions. One of those exceptions is as follows: "So long as the contract continues *executory*, the plaintiff must declare specially; but when it has been *executed* on his part, and nothing remains but the payment of the price in money by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or may declare specially, on the original contract, at his election." Castagnino v. Balletta, 82 Cal. 250, 258, 23 P. 127, 128. In the instant case under the uncontroverted testimony the sole claim of the plaintiff was based on an agreement which he claimed was made between him and George D. Lucy and which, according to his claim, had been wholly executed on his part. The second

point made by the defendant, and which should be noticed at this time, is her claim that plaintiff's services were rendered to G. R. Lucy & Company, a partnership, and did not create a personal obligation on the part of George D. Lucy, deceased. In the first place, whatever merit there might be in that contention, the subject-matter was waived by the defendant. She did not present the point by demurrer nor by answer. It was therefore waived. Code Civ.Proc., § 434; 20 Cal.Jur. 576; Williams v. Southern Pacific R. R. Co., 110 Cal. 457, 459, 42 P. 974; Baker & Hamilton v. Lambert, 5 Cal.App. 708, 91 P. 340. In the second place, it was the contention of the plaintiff that George D. Lucy employed him to perform the duties of the former. If such was the fact, it is perfectly clear that George D. Lucy and not the partnership was responsible to the plaintiff.

[5-9] We pass now to the points made by the plaintiff. He was called as a witness in his own behalf. The defendant constantly interposed objections under subdivision 3, section 1880, of the Code of Civil Procedure. Many of her objections were sustained. No one of those rulings is assigned as error. Later he was passed to the defendant for cross-examination. The defendant propounded to him many questions regarding facts occurring during the life of the decedent. No objection was interposed. When the cross-examination was finished, the plaintiff's counsel, on redirect examination, propounded questions to the plaintiff regarding facts that occurred during the life of the decedent. To nearly every question the defendant objected under the provisions of said statute. Many of said objections were sustained. At this time the plaintiff assigns said rulings as prejudicial error and earnestly contends that the cross-examination of the plaintiff waived the privilege mentioned in the statute. 11a Cal.Jur. 908, 909, 910; Kinley v. Largent, 187 Cal. 71, 200 P. 937; McClenahan v. Keyes, 188 Cal. 574, 206 P. 454; Deacon v. Bryans, 88 Cal.App. 322, 263 P. 371; Id., 212 Cal. 87, 298 P. 30; Stankey v. Palmer, 6 Cal.App.(2d) 215, 44 P.(2d) 382; Cahill v. Goecke, 10 Cal.App.(2d) 279, 51 P.(2d) 905; Miller v. Consolidated Royalty Oil Co. (C.C.A.) 23 F.(2d) 317; Zackheim v. Zackheim, 75 Colo. 161, 225 P. 268; 70 C.J. 373, notes 88 and 89. The defendant resists the plaintiff's contention on several different grounds. She contends that the plaintiff's complaint did not state a cause of action. We have shown above that it did. She contends that on the direct examination, over her objection, the plaintiff had testified to facts which occurred prior to the death of his father, and that she had the right on cross-examination to elicit similar testimony. She also claims that by reason of the peculiar facts of the case she was entitled to show the relations that existed between the parties to the contract. Continuing, she claims her conduct did not constitute a waiver. Estate of Boyes, 151 Cal. 143, 90 P. 454; Jameson v. Tully, 178 Cal. 380, 173 P. 577; 70 C.J. 373, and notes 86 and 87. An examination of the authorities cited by the respective counsel discloses no real conflict. As to any question propounded during the direct examination of the plaintiff it will be conceded that the defendant had a right to cross-examine. However, she did not have the right in cross-examining to elicit new matter. If she did so as to material matters which occurred before the death of the decedent then she waived the privilege provided in the statute. The question is: Did she in the cross-examination develop such new matter? On his direct examination the plaintiff identified the books of account and the various handwritings contained in said books of G. R. Lucy & Company. He also testified as to his employments and occupations prior to 1929 and the compensation received from other employers. He did not give any testimony regarding the receipt by him from the decedent of any moneys nor that decedent supported him at any time after he attained his majority. His testimony regarding the books of account was properly received. Roche v. Ware, 71 Cal. 375, 12 P. 284, 60 Am.Rep. 539. Conceding, but not deciding, that his testimony regarding his training was inadmissible (Moore v. Schofield, 96 Cal. 486, 489, 31 P. 532), manifestly it was not prejudicial. The cross-examination proceeded as follows: "During the years from October 29, 1929, until the death of my father, I resided at 1201 Fulton street, which was the house of my father. He supported me and gave me room and board free. He did not buy my clothes. At one time he made me a present of a suit. That is the only present he made me during that period that I have any recollection of. He made me a Christmas present of some mining stock. Between October 29, 1929, and the death of my father he made me a money present. It was $500. I do not recall when that was. I do not recall that he made me a present at Christmas of 1929. In most cases it was cus-

tomary for him to make a present to me and my sister in equal amounts at Chirstmas time. I do not recall that on Christmas 1929 he made me a present of $1000. He did not give me a Christmas present in 1930. I don't recall whether he did in 1931. He gave me $500. I don't recall the date." It is quite clear the subject-matter of the cross-examination just quoted was all new matter. It is also clear it made a prima facie defense for the defendant. Civ.Code, § 210. On redirect examination the plaintiff's counsel asked several questions; the defendant objected, claiming the witness was precluded under the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure. Some of the objections were overruled and some were sustained.

"Q. What were the circumstances under which you went to live in your father's home from October 29, 1929, until the date of his death? (Objection made and overruled.) A. My father told me he wished me to stay home and to help him to manage the business G. R. Lucy & Company, because he wanted to keep it running on account of the fact that it could be sold as a going concern in the event that the Western Pacific or other railroads wished to buy it, and he also agreed to pay me.

"Q. What did he agree to pay you? A. He agreed to pay me $250—

"Mr. Molloy: I move to strike that out.

"The Court: The motion to strike out relative to the fixing of compensation, let that be stricken out."

Some of those questions to which objections were sustained were: "Q. What were the circumstances under which you say you went into your father's employ on October 29, 1929? Mr. Lucy, as a part of the conversation pertaining to your living at your father's home, what, if anything, was said in respect to the compensation he would pay you if you went down to manage the business? After that conversation with your father, on or about October 29, 1929, did you enter the employ of your father?" Under all of these circumstances the defendant waived the privilege contained in the statute. Code Civ.Proc. § 1880, subd. 3. We need go no further than cite Deacon v. Bryans, 88 Cal.App. 322, 328–330, 263 P. 371. It follows that the trial court erred in sustaining defendant's objections to said questions asked on redirect examination and in granting the defendant's said motion to strike out. The nature of plaintiff's complaint we have stated above. As stated above, the defendant's defense rested on the provisions of section 210 of the Civil Code. The result of the rulings was to establish the defense and negative the claim of the plaintiff. It is clear, therefore, that said rulings were prejudicial.

[10] The plaintiff asserts he alleged he had not been paid. The answer did not deny the allegation, but the trial court made a finding that he had been paid. Continuing, he claims the court erred in making said finding. His claim is clearly supported by the authorities. As the action must go back for a new trial, it is proper to state that matters not put in issue by the pleadings should not be found upon.

[11] The last point made by the plaintiff is that this court should order judgment in his favor. Owing to the condition of the record we think this is not a proper case in which this court should make that order. As we have shown, the evidence as to the agreed value of the services of the plaintiff was erroneously stricken out. If it had not been stricken out the defendant might have cross-examined on the subject and shown facts in her favor. By reason of the disputed questions that arose the defendant did not present any defense. Again, if she had done so the amount of the plaintiff's claim might have been materially reduced.

The judgment is reversed.

We concur: SPENCE, Acting P. J.; OGDEN, Justice pro tem.

9 Cal.2d 591

FIRST CONGREGATIONAL CHURCH OF GLENDALE v. LOS ANGELES COUNTY et al.

L. A. 15444.

Supreme Court of California.

Sept. 24, 1937.

1. Taxation ⚷537

A property owner objecting to tax may pay tax and then bring action to recover amount paid if statutory requirements have been complied with (Pol.Code, § 3819).

2. Statutes ⚷190

Where language of statute is plain and requires no construction, court's only function is to apply terms of statute to facts presented.

3. Taxation ⚷251

Where religious corporation, after its alleged exempt property had been sold to state for delinquent taxes, paid to county treasurer amount required to redeem property, such payment was not a payment of disputed taxes and could not be recovered by corporation under statute authorizing recovery of taxes paid under protest (Pol.Code, §§ 3611, 3732, 3819; Const. art. 13, § 1½).

4. Constitutional law ⚷70(1)

The express terms of statute may not be changed by construction.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the First Congregational Church of Glendale, a religious organization, organized under the laws of the State of California, against the Los Angeles County and another. From a judgment following an order sustaining without leave to amend a demurrer to plaintiff's complaint, plaintiff appeals.

Judgment affirmed.

Prior opinion, 65 P.(2d) 813.

James P. Mackel, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, D. De Coster, Chief Deputy Co. Counsel, and Gordon Boller, Deputy Co. Counsel, all of Los Angeles, for respondent Los Angeles County.

Bernard Brennan, City Atty., of Los Angeles, for respondent City of Glendale.

EDMONDS, Justice.

The appellant is a religious corporation owning real property which it claims is exempt from taxation under the provisions of section 1½ of article 13 of the Constitution of California. In the year 1930 it failed to file an affidavit stating facts concerning the ownership and use of the property for religious purposes as required by section 3611 of the Political Code. Thereafter, on June 30, 1931, the respondent County of Los Angeles sold the property to the state for delinquent taxes which had been assessed thereon. Appellant then paid to the county treasurer the amount required by law to redeem the property and brought this action to recover the amount so paid. The appeal is prosecuted from a judgment which followed an order sustaining without leave to amend a demurrer to the appellant's complaint.

The complaint alleges that in the year 1930 there was located on the real property in question a church building which was used solely and exclusively for religious worship; "that said building never has been rented for religious purposes and that no rent ever has been received for said building which is used exclusively for religious purposes." It is then alleged that these facts were well known to the assessor and also to the tax collector of the respondent county but that in 1930 the property was assessed to the appellant upon the assessment roll for that year. According to further allegations of the complaint, after the sale to the state, the appellant tendered to the tax collector of the respondent county and afterward paid to its treasurer an amount equal to the tax assessed against the property, with penalties, costs, and interest, the payment being accompanied by a notice of protest in writing. This notice recites that the appellant "under protest and in no sense as a voluntary payment, pays to you the amount of said taxes with the aforesaid penalties, costs and interest * * * claiming the right to recover back and to have repaid to it the whole of said amount of said alleged tax and accrued penalties, cost and interest. * * *"

The appellant bases its right to recover upon section 3819 of the Political Code. This section provides that: "At any time after the assessment-book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment." Obviously the time when payment may be made to the tax collector under the provisions of this section is the period between the date when the equalized, certified assessment roll is turned over to him by the auditor, which by section 3732 is required to be done on or before the 1st day of October of each year, and June 30th of the following year. The appellant concedes that at the time it made a tender to the tax collector no taxes for the fiscal year 1930 could legally be paid to him, but it contends that, as the Political Code section allowing the payment of taxes under protest is a remedial statute, it should have a liberal construction, and that under such a construction payment to the county treasurer, even after the time specified therein for payment to the tax collector, is a sufficient compliance with its requirements.

[1] Section 3819 of the Political Code was undoubtedly enacted by the Legislature to provide a simple and direct method for the owner of property to challenge a tax levied against it. It gives a property owner the right to pay the tax and then bring an action to recover the amount of the payment, "and when the directions of the act are followed it is provided that the payment of the tax 'shall in no case be regarded as voluntary payment.'" Stewart Law & Collection Co. v. County of Alameda, 142 Cal. 660, 76 P. 481, 483. Under its provisions payment of taxes may be made to a county tax collector under particular conditions during a specified period, and where the requirements of the statute are complied with an action will lie to recover the amount paid. When the property owner pays taxes in the manner specified, he is not required to plead or prove that the payment was made under compulsion or coercion.

[2-4] The language used by the Legislature in enacting these provisions is plain, and requires no construction. Under such circumstances the only function of the court is to apply the terms of the enactment to the facts presented. Wilson v. Johnson, 1 Cal. (2d) 288, 34 P.(2d) 487. To hold that payment to the county treasurer of the amount required for the redemption of property sold

for taxes meets the requirements of a statute allowing payment to the tax collector of the amount of taxes before a sale of the property would substitute conditions entirely different from those laid down by the Legislature. No rule of construction allows a change in the express terms of a statute. The benefits of this section can only be obtained by those who follow its requirements and the payment made by the appellant did not comply with its provisions in any essential particular.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

9 Cal.2d 601

BARROW v. SANTA MONICA BUILDERS SUPPLY CO. et al.

L. A. 15371.

Supreme Court of California.

Sept. 28, 1937.

Rehearing Denied Oct. 28, 1937.

1. Mechanics' liens 🔑291(7)

In proceedings to foreclose mechanic's lien wherein purchaser at sale under trust deed was joined and findings were waived by those appearing, decree reciting that claims of all defendants, expressly naming purchaser, were inferior to claims of mechanic's lien claimants, was an adjudication that work of mechanic's lien claimants was commenced before trust deed was recorded and that those liens attached prior to lien of trust deed as effective as if it were made on findings of fact (Code Civ.Proc. § 1186).

2. Judgment 🔑951(1)

In suit to quiet title by purchaser at sale under trust deed, all presumptions supported decree in prior proceedings to foreclose mechanic's liens wherein purchaser was joined, findings were waived by those appearing, and decree was rendered that purchaser's title was subordinate to mechanic's liens.

3. Judgment 🔑951(1)

In suit to quiet title by purchaser at sale under trust deed, it would be presumed, in support of prior decree determining that purchaser's title was inferior to mechanic's liens, in proceeding to foreclose mechanic's liens in which purchaser had been joined and in which findings had been waived, that if findings had been made, they would have been consistent with decree (Code Civ.Proc. § 1186).

4. Judgment 🔑713(2)

In proceedings to foreclose mechanic's liens wherein purchaser at sale under trust deed was joined, decree determining that purchaser's claim was inferior to mechanic's liens, thereby necessarily determining that building which formed basis of mechanic's liens was commenced before trust deed was recorded, was res judicata as to right of respective lien claimants, and hence could not be attacked thereafter by purchaser in action to quiet title notwithstanding purchaser did not litigate his title in foreclosure proceedings and that parties may have omitted to urge various matters which might have changed the result (Code Civ.Proc. § 1186).

5. Judgment 🔑713(2)

When an issue is litigated and a party is given his day in court, it is policy of law to demand of a defendant that all his defenses be asserted under penalty of forever losing right to thereafter urge them.

In Bank.

Appeal from Superior Court, Los Angeles County; William M. Rains, Judge pro tem.

Action by John V. Barrow against the Santa Monica Builders Supply Company and others. Judgment for the plaintiff, and the defendants appeal.

Reversed.

For prior opinion, see 64 P.(2d) 737.

John F. Poole, of Los Angeles, for appellants.

W. A. Martin, Leland S. Bower, and Arch Vernon, all of Los Angeles, for respondent.

NOURSE, Justice pro tem.

On January 2, 1925, the owner of the real property which is the subject of this action to quiet title executed a trust deed in favor of one Stewart, which deed was recorded on January 6, 1925, and the note secured thereby was later assigned to one Ross. On February 20, 1926, the property was sold under foreclosure by the trustee to Barrow, who is the plaintiff and respondent herein. Some time during the month of January, 1925, materials were furnished for the construction of a building upon the premises out of which liens attached which were foreclosed in a proceeding in which Barrow was served as a defendant "First Doe," and the trustee and the beneficiary were both sued and served. Those actions were commenced in June, 1925, and were consolidated for trial. No answer was filed by Barrow or by the trustee, and their defaults were entered. The beneficiary answered disclaiming any interest in the property. Judgment was entered against all the defendants sued therein, decreeing that their claims or interests in the property were subject and subordinate to the claim of the mechanic's liens. On May 27, 1930, the property was sold to satisfy these mechanic's liens, and the Santa Monica Builders Supply Company became the purchaser. On April 28, 1932, Barrow commenced this action to quiet title and had judgment decreeing that he was the owner in fee of the property and that none of the defendants had any interest therein.

[1-5] The appeal is on a bill of exceptions. There is no substantial controversy as to the facts. The single question involved is whether a lien claimant whose interests were determined in a former suit to foreclose a mechanic's lien can thereafter attack that decree in a suit to quiet title. A determination of the question involves the question whether, in a suit to foreclose a mechanic's lien, other lien claimants may be joined and the priority between the liens determined. The judgment herein rests upon the decision in Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 959, 79 Am.St. Rep. 118, and similar cases holding that a foreclosure suit cannot be turned into a suit to quiet title. The appellants herein argue that the rule of those cases is not applicable here because their foreclosure suits did not involve any question of adverse title but sought only a determination of priority between existing lien claimants. When the consolidated actions to foreclose the mechanic's liens were tried, the priority of those liens over the "right title and interest" of all the defendants therein was put in issue. Aside from the question of adverse or paramount title the "interests" of defendant Barrow depended upon the determination of the question whether his lien was prior in right to those of the plaintiffs. If the building which formed the basis of the mechanic's liens was commenced before the deed of trust was recorded, those liens would be preferred over any lien arising out of the deed of trust. Section 1186, Code Civ.Proc.; Sax v. Clark, 180 Cal. 287, 290, 180 P. 821; Sun Lumber Company v. Bradfield, 122 Cal. App. 391, 395, 10 P.(2d) 183. The determination of the question of the priority of the various liens depended in part upon the determination of the question when the various liens attached, and, though the defendant Barrow did not appear therein and findings were waived by those appearing, the decree recited that the claims of all the defendants (expressly naming Barrow) were "subsequent and subordinate to the claims of plaintiffs herein." This was an adjudication of the priorities which was just as effective as though it were based on findings of fact that the work of the lien claimants was commenced before the deed was recorded, and that those liens attached prior to the lien of the deed of trust. It is conceded that if this were true the mechanic's liens would be superior to the other. But the respondent now argues the court made a mistake in its former decree, and that he should now be permitted to show in this proceeding that his deed was in fact recorded before the work commenced, and that his lien was therefore prior in right to that of the plaintiffs in the former actions.

The position of respondent cannot be sustained. All presumptions support the former decree, and hence it must be presumed that if findings had been made in that action they would have been consistent with the portion of the decree declaring that the lien of the respondent was subsequent and subordinate to the mechanic's liens. 2 Cal.Jur. 852. This is so even though one of the complaints in those actions alleged that materials were furnished at a date subsequent to the recordation of the deed of trust. But, since findings were waived in those actions and none of the evidence was before the court in this action, it was impossible for the court to determine the correctness of the former decree on this matter of fact. The conclusion necessarily follows that the former decree was a complete and full adjudication of the merits of the respective lien claimants, and that that decree cannot now be attacked in this collateral proceeding.

The respondent argues that this view is contrary to the established rule of Beronio v. Ventura Lumber Company, supra, and similar cases, that "a foreclosure suit cannot properly be turned into a suit to quiet title." The Beronio Case was one to foreclose an ordinary mortgage. It was there held that the object of such a suit was to subject to judicial sale the same title or estate which the mortgagor had at the time of the execution of the mortgage. But it was also held that the only proper or necessary parties to such a suit are the mortgagor "and those who claim an interest in the property derived subsequent to the date of the mortgage." That case was discussed at length in Dobbins v. Economic Gas Co., 182 Cal. 616, 624, 189 P. 1073, where it was said that the "extent" of the lien and whether other claims were subordinate to it were proper issues to be tried in a foreclosure proceeding. A distinction was there made between a claim of title which was adverse to the mortgagee and a claim of lien which was subject to the mortgage, and it was said that (at page 624 of 182 Cal., 189 P. 1073, 1077), "It would seem as if it were one of the proper functions of a foreclosure suit to determine what it is which can be and is foreclosed." In Bewick v. Muir, 83 Cal. 368, 371, 23 P. 389, 390, a suit to foreclose a mechanic's lien where one of the defendants claimed under a prior mortgage, the court said: "The question as to the priority of this mortgage over the plaintiffs' liens was a material one." Whitney v. Higgins, 10 Cal. 547-551, 70 Am.Dec. 748, is a case closely parallel. There the plaintiff was the purchaser under a sale upon a decree in foreclosure of a mortgage, and the defendant claimed as purchaser under a similar decree in a suit to enforce a mechanic's lien. The mortgagee was not made a party to the suit to enforce the mechanic's lien and for that reason it was held that he could at a later date attack the decree as in no respect binding upon him. It was there held not only that the junior lien claimants were proper parties in the suit to foreclose the mechanic's lien, but it was held that they were necessary parties to the same extent as in a suit to foreclose an ordinary mortgage, the court stating: "A mortgage, in this State, is only a lien or incumbrance; the estate in the land remains in the mortgagor, and all persons interested in the estate at the time the suit is instituted to enforce the mortgage, whether purchasers, heirs, devisees, remainder-men, reversioners, or incumbrancers, should be made parties, or their rights will not be affected." To the same effect are Frates v. Sears, 144 Cal. 246, 77 P. 905; Paramount Securities Company v. Daze et al., 128 Cal.App. 515, 17 P.(2d) 1049; Continental & C. T. & S. Bank v. Pacific Coast Pipe Co. (C.C.A.) 222 F. 781, 788; 17 Cal.Jur. p. 173; and 18 R.C.L. p. 982. In the Dobbins Case it was recognized as the usual practice that when the question of priority of conflicting liens was presented in a foreclosure suit such question was deemed properly determinable there. The books are full of decrees affirming judgments of this character, some determining that the mechanic's lien was superior to that of a mortgage or deed of trust, and some under different facts reaching an opposite result. It is manifest that the practice has not recognized the decision in the Beronio Case as holding either that conflicting lien claimants were not proper parties in a foreclosure suit where the question of priority was put in issue or that one who is joined as a party in such a suit could thereafter repudiate the decree as not being binding upon him.

For these reasons it is of no importance that the respondent herein did not volunteer to litigate his title in the foreclosure suits. It is sufficient that he was sued and served with process and that he had full opportunity to tender the issue of priority as between his lien and that of the plaintiffs in those actions. The complaints in those actions are not models of good pleading, but they were sufficient at the time to inform the defendants therein that the priorities of the various liens were to be litigated. The determination of that issue is binding in this action notwithstanding the parties may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. When an issue is litigated and a party is given his day in court, it is the policy of the law to demand of a defendant that all his defenses "be asserted under the penalty of forever losing the right to thereafter so urge them." Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 511, 258 P. 387, 391; Andrews v. Reidy, 7 Cal.(2d) 366, 371, 60 P.(2d) 832; 15 R.C.L., pp. 969, 970.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.

H. & J. MABURY CO. v. BRYANT et al.

L. A. 16173.

Supreme Court of California.
Sept. 23, 1937.

Rehearing Denied Oct. 21, 1937.

1. Adverse possession ⚷42

In action to quiet title, limitations were not effectively tolled with respect to certain heirs pending appointment of administrator of their ancestor's estate, where claimant had good record title to property in dispute as well as good title by adverse possession prior to ancestor's death.

2. Adverse possession ⚷117

There is no inconsistency between the finding of good record title and the finding of good title by adverse possession.

3. Quieting title ⚷49

In action to quiet title, relief may be awarded respecting additional land, including part or all of the land with which plaintiffs' complaint is concerned, brought into issue by cross-complaint and answer thereto praying for affirmative relief and for the quieting of title in plaintiff as to such additional land.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by H. & J. Mabury Company against Calhoun Bryant, as administrator of the estate of Berryman Bryant, deceased, and as administrator of the estate of Henriette F. Bryant, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Lelia R. Leep and William Shutz, both of San Francisco, and Borton, Petrini & Conron, of Bakersfield, for appellant.

Leib & Leib, of San Jose, McCutchen, Olney, Mannon & Greene, of San Francisco, and W. B. Beaizley, of Bakersfield, for respondent.

WASTE, Chief Justice.

In October, 1931, plaintiff Mabury Company brought this action to quiet title to some 1,260 acres of land located in Kern county. In December, 1931, the defendant, administrator of the estates of Berryman Bryant and Henriette F. Bryant, both deceased, answered and also cross-complained, asserting an interest in and seeking to quiet title to about 17,920 acres of land, called the Antelope ranch, which included within its borders the 1,260 acres described in plaintiff's complaint. In April, 1936, the original defendant administrator having died, there was a substitution of a new defendant administrator. In May, 1936, plaintiff filed an answer to defendant's cross-complaint, claiming title to all the land described therein, save about 320 acres, and praying that its title thereto be quieted.

After further proceedings in the cause, wherein a demurrer to the answer to the cross-complaint was overruled, and the trial date was set, defendant, on September 11, 1936, moved for a continuance on the ground that there were two other causes of action pending between the same parties as to the same subject-matter, and also moved that he be allowed to amend his answer and cross-complaint to include a second cause of action for an accounting of rents, issues, and profits of the property. The court denied the motion, with the proviso that, if it should develop on the trial on the merits that an accounting would be advisable and necessary, then a continuance should be granted for the hearing of that part of the action. Defendant thereupon, on September 15th, filed notice of appeal from the order denying him a continuance of time of trial and the right to amend his pleadings. The following morning, September 16th, the cause was called for trial on the merits. Plaintiff appeared prepared for trial. Counsel for defendant appeared "Generally and only for the purpose of objecting to the trial * * * on the grounds that there is an appeal pending from a denial of a motion for continuance." After argument defendant's objections to proceeding were overruled and the trial proceeded, neither defendant nor his counsel making an appearance at the afternoon session of court. At the close of the trial the court made findings in favor of plaintiff, and on September 28, 1936, gave judgment quieting plaintiff's title to both the property described in its complaint and that claimed by its answer to defendant's cross-complaint. On September 30th defendant made a motion, supported by affidavit of counsel, to set aside the judgment under section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851, § 34), on the ground of mistake in believing that the order denying a continuance and leave to amend was an appealable order so that the pendency of the appeal deprived the trial court of jurisdiction to proceed with the trial. On October 21st this motion to vacate under section 473 was denied. On November 6, 1936, defendant gave notice of appeal (1) from the judgment; (2) from the order of September 11th denying a continuance and leave to amend the answer and cross-complaint prior to trial; and (3) from the order of October 21st denying the motion to set aside the judgment.

A typewritten clerk's transcript on appeal was filed on December 21, 1936, which contained, in addition to a transcript of the judgment roll, improperly included affidavits and other matters pertaining to the motion to vacate, which are extraneous to the judgment roll and form no part of the clerk's transcript.

On March 2, 1937, the cause was before this court on motions of both plaintiff and defendant. Defendant sought to strike the cross-complaint and answer thereto, which would reduce the area of the land in issue to that described in the complaint. He also moved for diminution of record for the purpose of bringing in certain depositions and other matters claimed to have been inadvertently omitted from the record on appeal. Plaintiff moved for dismissal of all the appeals. The motion for diminution of record was denied, and, by oral stipulation of defendant's counsel, the appeals, other than the appeal from the judgment and the appeal from the order denying motion to vacate and set aside judgment, were dismissed. The motion to dismiss as to the two latter appeals was submitted. Thereafter, on May 17, 1937, this court rendered its decision dismissing the appeal from the order denying the motion to vacate and set aside the judgment, but denying the motion to dismiss the appeal from the judgment. Mabury v. Bryant (Cal.Sup.) 68 P.(2d) 359. This court held that the improperly included matter in the clerk's transcript did not destroy it as a clerk's transcript of the judgment roll and, so far as the appeal from the judgment was concerned, suggested that, if it was not substantial, motion could be made, after the filing of appellant's opening brief, to dismiss the appeal or affirm the judgment. Thereafter the opening brief was filed and the cause is here before this court on motion of plaintiff to dismiss the appeal on the judgment roll from the judgment, or to affirm the judgment, upon the ground that the questions presented are so unsubstantial as to require no further argument.

Appellant's opening brief states five questions on appeal, the last three of which attack the correctness of the rulings made on appellant's motion for a continuance, to amend his pleadings, and to vacate the judgment under section 473, supra. A disposition of these matters adverse to appellant's contentions has already been made, as above shown. A consideration of the first two questions requires a brief statement of the facts found by the trial court which, on this judgment roll appeal, are assumed to be supported by the evidence.

The trial court found that certain described land, which it denominated the "Mabury property," and which comprises practically all of the property in issue, had for more than 28 years last past been owned by and in possession of plaintiff Mabury Company, a California corporation formed some 38 years ago, with its principal place of business in Santa Clara county. The court found that Berryman Bryant died July 15, 1898; that Henriette F. Bryant died June 13, 1902; that on September 30, 1931, William G. Bryant, the original defendant herein, was appointed administrator of the estates of said decedents; that he died on February 17, 1934, and on January 14, 1935, Calhoun Bryant was appointed administrator in his stead and is now the defendant herein. The court found that the claim to the Mabury property of said defendant as such administrator was wholly unfounded; that Berryman Bryant was not at the time of his death the owner of said property, nor had he or his administrator had for more than 50 years last past any right, title, or interest in and to said property, or to possession thereof.

The court further found that plaintiff had a good and valid title in fee simple to said property, deraigned duly and regularly from paramount source of title, and further that plaintiff entered into possession of said property under claim of title, exclusive of other right, founded upon a written conveyance from Hiram Mabury and Josephine Mabury, his wife, made, executed, and delivered to plaintiff May 14, 1903, and that plaintiff had ever since been in the continuous, open, notorious, and adverse occupation and possession of said property; that the property was not divided into lots and plaintiff had, during said period, usually improved the land and used it for pasturage of livestock thereon, for which purpose only it was suitable; that prior to said May 14, 1903, for more than 12 years, Hiram Mabury, the immediate predecessor in interest of plaintiff, was in the continued open, notorious, and adverse possession of said property; and that said property was assessed solely to and all taxes were paid thereon by Hiram Mabury from 1887 to 1902, both years inclusive; that since 1902 the property had been assessed solely to and all taxes had been paid thereon by plaintiff. The court also found that this present action was not barred by the prior action above referred to, filed October 14, 1931, which action was dismissed as to plaintiff herein on March 28, 1936.

[1, 2] Appellant contends that "the statute of limitations does not begin to run against the heirs of an estate where no administrator has been appointed and where the cause of action did not accrue until after the death of the ancestor," or, in other words, that here the period of adverse possession could not start to run against the Bryant estates until administration was taken out. The rule does not appear to be as stated by appellant (1 Cal. Jur. p. 519 et seq., § 20), but, moreover, even if it were so, it would be inapplicable here as the court found that plaintiff had good record title as well as good title by adverse possession completed in plaintiff's predecessor prior to the death of the Bryants, with conveyance of such title to plaintiff, which continued in possession. There is no inconsistency, as claimed by appellant, between the finding of good record title and the finding of good title by adverse possession. Taken together, these findings declare a complete interest in the property, whether deraigned from record title or from adverse possession, to be in plaintiff.

[3] Appellant's other contention is that "the trial court has no jurisdiction of the subject-matter of a cross-complaint and answer thereto in a quiet title action where more and different land is claimed by the defendant in such cross-complaint than was set out in the original complaint." This contention is likewise without merit. In an action to quiet title, relief may be awarded respecting additional land, including part or all of the land with which plaintiff's complaint is concerned, brought into issue by cross-complaint and answer thereto praying for affirmative relief and for the quieting of title in plaintiff as to said additional land. Stockton Sav. & Loan Soc. v. Harrold, 127 Cal. 612, 60 P. 165; Brown v. Luddy, 121 Cal.App. 494, 9 P.(2d) 326; 9 Cal.Jur.Supp. pp. 698, 699; Hough v. Wright, 127 Cal.App. 689, 16 P.(2d) 301.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.

9 Cal.2d 617

SELIG CAHN, Inc., v. CALIFORNIA WRECKING CO.

L. A. 16269.

Supreme Court of California.

Sept. 29, 1937.

1. Bills and notes 🔑430

Generally, the giving of a new note as a renewal of an outstanding note does not amount to payment, since presumption is that renewal note was not taken by payee in payment.

2. Bills and notes 🔑430

In the absence of an express agreement that the execution of a new note will satisfy indebtedness evidenced by an earlier note, giving of a renewal note does not extinguish the debt but extends time of its payment in accordance with terms of new note.

3. Bills and notes 🔑527(2)

In action on notes, evidence supported finding that other notes had not been executed in satisfaction of notes sued on.

4. Trial 🔑411

A party could not comply with order requiring party to produce certain of its books and records upon trial in action on notes and then object to introduction of records produced upon ground that order was improper, since party's remedy would be by appropriate proceedings to resist the order and not by objection to introduction of records.

5. Appeal and error ⚷1052(8)

Where there was abundant evidence to support findings and judgment for holder of notes, admission of records of maker allegedly without proper authentication, and which had been produced under order claimed to have been made without authority, was not prejudicial error.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Selig Cahn, Inc., against the California Wrecking Company. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

Harry J. Miller, of Los Angeles, for appellant.

Samuel A. Rosenthal and Charles Murstein, both of Los Angeles, for respondent.

EDMONDS, Justice.

The respondent in this action recovered a judgment upon two promissory notes made by the appellant. As a defense to the action the appellant asserts that these notes were paid by two others later given by it. The principal question presented by the appeal is whether there is evidence to support the findings of the trial court to the contrary.

In 1934, Selig Cahn and his son Julian Cahn were president and vice-president, respectively, and also directors, of the appellant corporation. Selig Cahn had full charge of all of its finances and accounts. On July 15, 1934, the corporation executed and delivered to one M. B. Cohn a promissory note for the principal sum of $2,000. The following month it gave another note to the same payee for the principal sum of $1,500. These notes were later transferred to Selig Cahn, and, after maturity, to the plaintiff corporation.

The facts concerning the issuance and delivery of the notes are not disputed. The evidence also shows that on May 1, 1935, the appellant executed and delivered to Selig Cahn, the then owner and holder of them, two other notes, one for $3,500 representing the principal thereof, and another for $158.75 representing accrued interest. It is contended by the appellant that the evidence shows that these notes were accepted by Selig Cahn in full payment of the notes made in 1934 and that the respondent is not entitled to recover upon them.

[1, 2] The general rule is that the giving of a new note as a renewal of one outstanding does not amount to payment; the presumption is that the renewal note was not taken by the payee in payment. Bridge v. Connecticut Mutual Life Ins. Co., 167 Cal. 774, 141 P. 375; Sather Banking Co. v. Briggs, 138 Cal. 724, 733, 72 P. 352; Kane v. Eastman, 110 Cal.App. 753, 295 P. 63. An express agreement to the effect that the execution of a promissory note satisfied the indebtedness evidenced by an earlier one must be shown by a maker who relies thereon. Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 P. 28. In the absence of such an agreement the giving of a renewal note does not extinguish the debt but extends the time of its payment in accordance with the terms of the new note. Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 137 P. 25; Welch v. Allington, 23 Cal. 322. Even the fact that the creditor surrenders the note of the debtor at the time of receiving a new note from him has been held to be insufficient to require the conclusion that the renewal note was accepted in payment.

[3] While there is evidence offered in behalf of the appellant which tends to show that the notes dated in 1935 were accepted by Mr. Cahn in payment of the two he then held, there is substantial evidence to support the finding of the trial court that no notes were made, executed, or delivered in full or any satisfaction or payment of the notes first made by the appellant. It is significant in this connection that the original notes were never canceled or delivered to the appellant and that the later notes, which were kept in the office of the appellant, were destroyed by its secretary in January, 1936. The record also shows that, after Selig Cahn received the new notes of the appellant, he transferred the two first made by the appellant, representing them to be valid and subsisting obligations.

[4, 5] The appellant complains that the trial court by an order made without authority compelled it to produce certain of its books and records upon the trial. The remedy of the appellant, if it wished to resist the order, was by appropriate proceedings for that purpose. It could not comply with the order and then object to the introduction of the records which it produced upon the ground that the order was improper. People v. Mayen, 188 Cal.

237, 205 P. 435, 24 A.L.R. 1383. Also, without these records, which the appellant claims were admitted without proper authentication, there is abundant evidence to support the findings and judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J; LANGDON, J.; SHENK, J.; SEAWELL, J.

23 Cal.App.2d 99

McCOY v. JUSTICE COURT OF SANTA ANA TP.

Civ. 1671.

District Court of Appeal, Fourth District, California.

Oct. 6, 1937.

1. Execution 🔑53

A judgment creditor was entitled to levy on property of judgment debtor which had been transferred by judgment debtor's assignee for benefit of creditors as property of judgment debtor, and judgment creditor was not limited to levying on property by way of garnishment, since statute permitting a garnishment when property is in possession of a third party does not afford exclusive remedy (Code Civ.Proc. § 543, as amended by St.1933, p. 1863; § 688).

2. Prohibition 🔑10(2)

Whether a judgment creditor could levy on property of judgment debtor which had been transferred under a general assignment for benefit of creditors and thereafter conveyed by assignee as that of debtor, or whether creditor was required to levy by way of garnishment, was a question of fact which did not go to jurisdiction of court to conduct hearing for purpose of determining title to the property, and hence third party claimant was not entitled to prohibition to prevent justice of peace from proceeding with hearing on ground that writ of execution was not properly levied because not levied by way of garnishment (Code Civ. Proc. § 543, as amended by St.1933, p. 1863; § 688).

3. Constitutional law 🔑306

In proceedings to determine title to property claimed by and in possession of a transferee of a judgment debtor, and to subject such property to satisfaction of judgment, the only essential requirements of due process would be notice of time and place of hearing and of the matter to be determined and an opportunity to be then heard (Const. art. 1, § 13).

4. Constitutional law 🔑106

There is no vested right in any certain form of procedure except as given by statute, and Legislature has power to change procedure in a particular instance so long as minimum requirements of due process are complied with (Const. art. 1, § 13).

5. Constitutional law 🔑306

Statute giving court authority to determine title to property claimed by and in possession of a transferee of judgment debtor, and to subject such property to satisfaction of the judgment which afforded a third party claimant ample opportunity to present question of his title, was not unconstitutional on ground of denial of due process (Code Civ.Proc. § 689; as amended by St.1935, p. 1958; Const. art. 1, § 13).

◆

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Proceeding by Paul V. McCoy for a writ of prohibition directed to the Justice Court of Santa Ana Township, County of Orange, State of California. From a judgment denying a peremptory writ of prohibition, the petitioner appeals.

Affirmed.

Macfarland, Scheinman & Sisenwein, of Los Angeles (Max Sisenwein and David Blonder, both of Los Angeles, of counsel), for appellant.

S. B. Kaufman and Robbie Anderson, both of Anaheim, for respondent.

BARNARD, Presiding Justice.

A drug company made a general assignment for the benefit of creditors. The assignee sold the drug store to Paul V. McCoy. A creditor of the drug company obtained a judgment in the Justice's Court of Santa Ana Township. A writ of execution was levied, the constable taking possession of the drug store then occupied by McCoy, who filed a third party claim. The constable released the property and the judgment creditor filed a petition in the respondent court asking that title to the property in question be determined. McCoy applied to the superior court for a writ of prohibition preventing the respondent justice's court from conducting a hearing to determine in whom title to the property levied upon was vested. An alternative writ was issued, but at the hearing the prayer for a peremptory writ was denied. From that judgment and order this appeal was taken.

[1, 2] The appellant contends that the respondent court was without jurisdiction to determine who had title to the personal property in question for two reasons. It is first urged that the writ of execution was not properly levied and was, therefore, illegal and void. In this connection it is argued that the manner of levying execution when property is in the possession of a third party is governed by sections 688 and 543 (as amended by St.1933, p. 1863) of the Code of Civil Procedure and that, therefore, such a levy may only be made by way of garnishment. While section 688 permits a garnishment in such a case, that remedy is not made exclusive, and, under preceding sections of the Code, execution could be levied by seizing the property as that of the judgment debtor, if the interested parties desired to take that risk. A further consideration is that this question does not go to the jurisdiction of the respondent court to conduct a hearing for the purpose of determining title to the property but is one of the questions of fact to be determined at that hearing.

[3-5] As a second attack upon the jurisdiction of the respondent court in this matter the appellant argues that section 689 of the Code of Civil Procedure (as amended by St.1935, p. 1958), in purporting to give a court the power to determine who has title to property claimed by and in the possession of a transferee of the judgment debtor, and to subject such property to the satisfaction of a judgment, is unconstitutional and void as depriving such a transferee of property without due process of law. No particular respect in which due process is denied is set forth, the appellant contenting himself with a bare statement of the proposition. The only authorities presented relate to general proceedings supplemental to execution, provided for in sections 714 to 720 of the Code of Civil Procedure, as amended, and are cases holding that in such a proceeding an order of the judge or referee requiring a third party having possession of and claiming the property to surrender the same to the creditor to be applied in satisfaction of his debt would be invalid, as having the effect of depriving a party of his property without due process of law.

While the proceeding here in question, authorized by section 689, has been referred to as a supplementary proceeding (Stafford v. Geary, 130 Cal.App. 22, 19 P.(2d) 837), this procedure is essentially different from that contemplated by the other sections above referred to, in that notice of the time, place, and purpose of the hearing and an opportunity to be heard is here afforded to the third party claimant. The third party claim must be filed with the court and constitutes the pleading of such party and is deemed controverted by the plaintiff or other person in whose favor the writ runs. The provisions for notice are ample, and an opportunity is given to a third party claimant to fully and completely present the question of his title. We are unable to see how this statute violates the due process clause of the Constitution (Const. art. 1, § 13) in failing to provide for the same forms of pleading and the same rules in all respects as are provided in certain other forms of action. So far as material here, the only essential requirements of due process of law would be notice of the time and place of hearing and of the matter to be determined, and an opportunity to be then heard. There is no vested right in any certain form of procedure except as this is given by statute and the Legislature has the power to change the procedure in a particular instance so long as the minimum requirements of the due process clauses of the Constitution are complied with. Under the statute here in question the parties claiming an interest in the property are accorded their day in court upon adequate notice both as to the time and place of the hearing and the matter to be determined. We conclude that section 689 is not unconstitutional for any of the reasons here urged.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

In re MILLER'S ESTATE.

Civ. 10358.

District Court of Appeal, First District,
Division 2, California.

Oct. 1, 1937.

Hearing Denied by Supreme Court
Nov. 26, 1937.

1. Husband and wife ⇨249

The payment by husband of membership fee and dues to beneficial association from community funds impressed money payable upon his death with same character of community property.

2. Insurance ⇨773

The designation of a beneficiary in benefit certificate initiates an inchoate gift to beneficiary of money payable on member's death, and gift becomes complete upon member's death if there has been no change in designation.

3. Husband and wife ⇨273(1)

Where husband paid membership fee and dues to beneficial association with community funds but failed to designate a beneficiary, and association's constitution named wife as beneficiary in absence of designation by husband, proceeds of certificate vested in wife upon husband's death as her separate property, since husband could give community property to wife and convert it into her separate property, and, on wife's death, husband's sole heir was not entitled to one-half of proceeds, but wife's sole heirs were entitled to all of proceeds (Probate Code, § 228).

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Winifred Miller, deceased, wherein Annie Saul and others and W. R. Miller filed claims. From a decree of distribution awarding half of a fund to W. R. Miller and the other half to Annie Saul and others, Annie Saul and others appeal.

Decree reversed, with instructions.

Hearing denied by Supreme Court; HOUSER and EDMONDS, JJ., dissenting.

John B. Ehlen, of San Francisco, for appellants.

E. R. Hoerchner, of San Francisco, for respondent.

GRAY, Justice pro tem.

The present controversy was submitted upon an agreed statement, in which the following facts appear: Ellis M. Miller died, leaving a widow, Winifred Miller, who only survived him for approximately two weeks. At his death he was a member in good standing of the Widows' and Orphans' Aid Association of the San Francisco Police Department. He had paid membership fees and dues from community funds. The association's constitution authorized each member to designate the person whom he desired to receive the moneys which were payable on his death and to change such designation. It also provided that upon the death of a member there should be paid the sum of $2,500 to his widow if no person had been designated by him. The deceased husband had never made such designation. The association had paid the money to the administrator of the wife's estate. Upon the hearing of the petition for distribution of her estate, respondent W. R. Miller claimed that, as the money was community property of the husband and wife, he as the sole heir of the husband was entitled to one-half under section 228 of the Probate Code, and appellants Annie, Mary, and Christopher Saul claimed that, as the money was the wife's separate property, they as her sole heirs, should receive the whole thereof. The decree of distribution, from which the present appeal is taken, awarded, upon the theory that it was community property, one half of the money to respondent and the other half to appellants.

[1-3] The payment of the membership fee and dues by the husband from community funds impressed the money payable upon his death with the same character of community property. The designation of his beneficiary initated an inchoate gift of such money to the beneficiary, which became complete upon his death, without a change in such designation. Travelers' Insurance Co. v. Fancher, 219 Cal. 351, 26 P.(2d) 482. Until the husband exercised his right to designate his beneficiary, the association's constitution named his wife as such beneficiary. 45 Cor.Jur. 190. Since he could give community property to his wife and thereby convert it into her separate property, it is apparent that proceeds of the life insurance vested in her, upon his death, as her separate property. Jenkins v. Jenkins, 112 Cal.App. 402, 297 P. 56; Mazman v. Brown, 12 Cal.App.(2d) 272, 55 P.(2d) 539. Section 228 of the Probate

Code is not applicable to community property which the husband, by gift, has converted into his wife's separate property. Estate of McCauley, 138 Cal. 546, 71 P. 458; Estate of Simonton, 183 Cal. 53, 190 P. 442; In re Kessler, 217 Cal. 32, 17 P.(2d) 117. Because the money paid by the association was the deceased wife's separate property, appellants were entitled to the distribution of the whole thereof and respondent was not entitled to one-half thereof.

The decree of distribution is reversed, with instructions to enter a decree distributing the balance of such money remaining in the estate to appellants.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

---

22 Cal.App.2d 661

STEWART v. SAN FERNANDO REFINING CO. et al.

Civ. 11519.

District Court of Appeal, Second District, Division 2, California.

Sept. 27, 1937.

1. Sales 🔑181(11)

In action against buyer for breach of contract to take certain quantities of oil, evidence was sufficient to show that seller tendered the installments of oil to buyer prior to a certain date and that buyer, without questioning form of tender, rejected it.

2. Sales 🔑383

In action against buyer for breach of contract to take certain quantities of oil, evidence was sufficient to show that market value of oil at place of delivery was substantially 74 cents a barrel, whereas contract price was 81 cents per barrel.

3. Appeal and error 🔑932(1)

On appeal from judgment for plaintiff, reviewing court would not presume that jury awarded damages as to items which were not supported by a preponderance of evidence in favor of plaintiff.

4. Appeal and error 🔑959(1)
Partnership 🔑64

In action by assignee of person doing business under a fictitious name for breach of contract, plea that assignee and his assignor were conducting and carrying on a business under a fictitious name without complying with statute, and that therefore assignee was without authority to bring or maintain action, was a "plea in abatement," and discretion of trial judge in denying leave to amend to file such plea would not be disturbed on appeal (Civ.Code, § 2466).

[Ed. Note.—For other definitions of "Plea in Abatement," see Words & Phrases.]

5. Pleading 🔑106(1)

Pleas in abatement are not favored.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by J. M. Stewart, Jr., against the San Fernando Refining Company, J. O. Moffett, and J. O. Moffett, doing business under the fictitious name of the San Fernando Refining Company. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

Hibbard & Kleindienst, of Los Angeles, by H. P. Hibbard, of Los Angeles, for appellant.

William H. Brawner and Caryl Warner, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action by the plaintiff as assignee of A. L. Becker, doing business under the fictitious name of Standard Dehydrating Company, for damages under a written contract for the sale of crude oil to be produced from the Santa Barbara mesa oil field to be delivered to the defendant at his refinery near Newhall. The contract was dated November 12, 1934, was for the term of one year, and provided for deliveries at the rate of approximately 100 barrels per day until the 31st day of March, 1935, and thereafter at the rate of 250 barrels per day.

[1] The first and primary contention of the defendant is that there was no evidence tending to prove that plaintiff's assignor properly tendered to defendant in the man-

ner required by the contract any oil which the latter unequivocally refused to accept prior to August 13, 1935. Viewing the evidence in the light most favorable to the plaintiff, we find that there is substantial evidence that the plaintiff's assignor continually tendered the daily installments of oil to the defendant, who, without questioning the form of the tender, rejected it. The record contains numerous statements to the effect that plaintiff's assignor pleaded with the defendant to accept the daily installments of oil and that defendant refused, assigning as his reasons that his storage was full or that he could not use the oil. Defendant's refusal to accept the oil continued until after the last delivery on May 7, 1935, when on June 1st the plaintiff telephoned the defendant and the defendant flatly refused to accept further deliveries of oil.

[2] The defendant next contends that there is no evidence showing that the market value of the unaccepted oil at the place of delivery was any sum less than the contract price. A reading of the transcript shows that there is substantial evidence that the market value of the oil at the place of delivery was substantially 74 cents per barrel, whereas the contract price was 81 cents per barrel.

[3] The defendant next complains that the court erred in instructing the jury relative to the measure of damages. We find nothing wrong with the instructions on the measure of damages. They are taken from several sections of the Civil Code which cover the situation. The defendant's real complaint in this regard seems to be that there is not sufficient evidence of special damage. But there was some evidence as to these items, and we will not presume that the jury awarded damages as to items where the evidence did not preponderate in favor of the plaintiff.

The defendant next contends that the court erred in inserting in one of the instructions presented by the defendant the words "or thereafter." We see no reversible error arising from this insertion.

The defendant next contends that the court erred in overruling the motion of the defendant for a judgment notwithstanding the verdict. This motion was based on the same grounds which have heretofore been presented and answered herein and is without merit.

[4, 5] Finally, the defendant contends that the court erred in denying the defendant's motion for leave to file an amended answer. On the second day of the trial defendant presented to the court his motion for leave to file an amendment to the answer. This motion was accompanied by the proposed amendment wherein it was alleged that at all times referred to in the complaint A. L. Becker and J. M. Stewart, Jr., were conducting and carrying on a business in the city of Santa Barbara under the name of Standard Dehydrating Company, a fictitious name, without complying with the provision of section 2466 of the Civil Code, and therefore the plaintiff, as assignee of A. L. Becker, was without authority in law to bring or maintain the action. The proposed amendment was a plea in abatement. Rudneck v. Southern California M. & R. Co., 184 Cal. 274, 193 P. 775; 1 Cal.Jur. 39. Such pleas are not favored in law. 1 Cal.Jur. 80; Bank of America National Trust & Savings Ass'n v. Cohen (Cal.App.) 69 P.(2d) 875. The discretion of the trial judge in denying a motion to amend an answer for the purpose of raising a plea of abatement under section 2466 of the Civil Code will not be disturbed on appeal. Bryant v. Wellbanks, 88 Cal.App. 144, 263 P. 332.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, J.

CALIFORNIA REPORTER

IN VOLUME

72 PACIFIC REPORTER
SECOND SERIES

COPP v. MILLEN et al.*
L. A. 15392.

Supreme Court of California.
Oct. 6, 1937.

Rehearing Granted Nov. 3, 1937.

Mortgages 🔑186(5)

In assignee's suit to foreclose mortgage, evidence supported finding that, at time assignee satisfied original mortgage and accepted new note and mortgage in suit, assignee had actual notice of unrecorded contract of sale executed by mortgagor, and showed that purchaser had no actual notice of assignee's rights, and hence unrecorded contract was superior to new mortgage (Civ. Code, § 1217).

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Cora Lord Copp against Vellzora Millen and Winfield Russell. From a judgment for defendant Russell, plaintiff appeals.

Affirmed.

Prior opinion, 65 P.(2d) 362.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

John B. Yakey and Walter R. Flint, both of Los Angeles, for respondent.

PER CURIAM.

Because of doubt in the minds of some of the members of this court as to the correctness of the conclusion reached by the District Court of Appeal in this cause (65 P.(2d) 362) it was transferred to this court for further consideration. After such examination and study we are satisfied with the conclusion reached, and therefore adopt as the decision of this court the opinion prepared by Mr. Associate Justice pro tempore White for and as the opinion and decision of this court:

"This is an action to foreclose a mortgage, dated September 10, 1929, which was executed by defendant Vellzora Millen to secure a note for $1,458.41 in favor of appellant as wife of Andrew J. Copp, Jr. The mortgage was recorded October 15, 1929, with instructions that when recorded it be returned to Andrew J. Copp, Jr. The defendant Vellzora Millen became the owner of the real property in question, under grant deed from said Andrew J. Copp,

---

*For subsequent opinion see 77 P.2d 1093.

Jr., on July 15, 1923; the latter at the same time taking back from the purchaser, as security for the purchase price, a mortgage and trust deed covering the property in the respective amounts of $1,250 and $885.58. Both of these last-named instruments were recorded September 8, 1923. Thereafter, on November 1, 1923, the defendant Vellzora Millen entered into a contract with respondent Winfield Russell, under the terms of which Vellzora Millen agreed to sell the property to respondent Russell for the sum of $3,500, payable $750 upon execution of the agreement and $35 or more monthly until the entire sum of $3,500 had been paid. This agreement was never recorded. Respondent Russell went into possession of the property about January 1, 1924, remaining in possession thereof continuously, with the exception of several months in 1929, when he was in the East, but during his absence the property was rented by him. Respondent Russell complied with the terms of his contract and made payments thereunder in full, completing said payments on May 4, 1931.

"On May 7, 1927, Andrew J. Copp, Jr., the holder of defendant Vellzora Millen's notes, mortgage, and deed of trust, assigned the same to his wife, Cora Lord Copp, appellant herein. The record indicates that Mrs. Millen failed to make her payments, and, when the statute of limitations was about to bar the two notes, appellant, in September, 1929, agreed with Mrs. Millen to renew said notes. Accordingly, on October 15, 1929, appellant caused a satisfaction of said mortgage and a reconveyance under said deed of trust to be recorded, taking from defendant Mrs. Millen on the same day a new note, which appellant contends was for the unpaid balance due on the purchase price notes, in the amount of $1,458.41; this last-mentioned note being secured by a mortgage on the real property here in question which was recorded October 15, 1929. The satisfaction and reconveyance, it will be noted, were recorded nearly six years after the execution of the unrecorded contract of sale and purchase between defendant Mrs. Millen and respondent Russell. The recitals in the release of the mortgage and the reconveyance under the deed of trust declared that the debts due under the mortgage and deed of trust were paid. Appellant produced testimony at the trial that such recitals were made by mistake and inadvertence on the part of the parties signing the instruments, and that the new note of September 10, 1929, upon which this lawsuit was predicated, was for the balance remaining unpaid on the original two notes, and was executed for the purpose of granting to defendant Mrs. Millen an extension of time within which to liquidate said obligations. The action now before us, instituted May 25, 1934, was commenced to foreclose the last-named mortgage of September 10, 1929. The trial court rendered a personal judgment in favor of plaintiff and against defendant Vellzora Millen, the maker of the note, but denied to plaintiff the right to foreclose her mortgage as against defendant Russell, decreeing that the right of defendant Russell to possession and ownership of the real property in question was superior to and prior to any rights of plaintiff by virtue of her last-named mortgage, of September 10, 1929. From the judgment rendered in favor of defendant Russell plaintiff prosecutes this appeal.

"In urging a reversal of the judgment, appellant presents several grounds, but we shall first consider her claim that the trial court erred in holding that at the time she satisfied the original mortgage and trust deed and accepted the note and mortgage sued upon, she had actual notice of the unrecorded contract of sale of the property in question between defendant Mrs Millen and respondent Russell, and that said contract was binding upon appellant. We do this because, in our opinion, if such holding of the trial court finds legal support in the evidence, it is determinative of this appeal. Section 1217 of the Civil Code declares: 'An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.' In the matter before us we have the simple and familiar case of the owner of real property executing two conflicting instruments affecting it, both for a valuable consideration; the latter of which instruments in date of execution is recorded before the former. The statutory rule in such cases is that the right of the holder of the second instrument, first recorded, is superior, unless the holder of the second instrument had notice of the existence of the rights of the holder of the first, unrecorded, instrument. (Randall v. Allen, 180 Cal. 298, 299, 300, [180 P. 941]). It is apparent from the foregoing facts that the all-important and controlling point in the case was that of notice on the part of appellant of the rights of respondent under his prior but unrecorded sale agreement. If appellant had such notice, then respondent's contract would be superior to the former's mortgage, otherwise it would not.

"We have examined the record and find therein evidence of sufficient substantiality * * * to amply support a finding that appellant did have actual notice of respondent's rights under his contract. * * * That respondent had no actual notice of any rights or interests claimed by appellant or her husband is manifest from his testimony, as follows: 'The first that I heard that Mr. Copp claimed an interest in this property was when I made my last payment on my contract.' And again, 'I do not know anything about the execution of this mortgage or its recordation. I never recorded my contract; it was left at the bank. * * * I never received any word from either Mr. Copp or Mrs. Millen about the claim made here, until after I demanded my deed.'

"The foregoing conclusions at which we have arrived make it unnecessary to discuss or decide other points raised."

The judgment appealed from is affirmed.

---

9 Cal.2d 647

In re GOLDEN'S ESTATE.

Sac. 5112.

Supreme Court of California.

Oct. 6, 1937.

1. Wills 🔑222

A will contest is essentially probate proceeding and hence in nature of proceeding in rem.

2. Wills 🔑431

A beneficiary under will, probate of which was set aside on contest thereof, is not entitled, on distribution of testator's estate, to portion of share of nonresident heirs, not served with citation nor formally appearing in contest proceeding, on ground that their failure to join therein rendered probate order binding on them; probate being revoked as to everybody.

In Bank.

Appeal from Superior Court, Mendocino County; Benjamin C. Jones, Judge.

In the matter of the estate of George Golden, also known as Geo. Golden and George Myron Linstead, deceased. From a decree of distribution, E. T. Stoddard appeals.

Affirmed.

Taft & Spurr, of Ukiah, for appellant.

Hale McCowen, Jr., of Ukiah, for respondent.

SHENK, Justice.

This is an appeal from a decree of distribution by which the entire estate was distributed to the heirs at law of the decedent.

[1, 2] The appellant, E. T. Stoddard, is not an heir, but claims a share in the estate under the terms of a document claimed to be the will of the decedent and admitted to probate on May 27, 1932. Within due time W. J. Linstead, a brother of the decedent, filed a contest of the purported will on the ground of forgery. A trial of the contest resulted in a judgment setting aside the order admitting the document to probate and revoking the order appointing an administratrix with the will annexed. The appellant herein was a party to that contest. As the sole appellant he took an appeal from the judgment revoking the probate. That judgment was affirmed by this court on September 3, 1935, Estate of Golden, 4 Cal.(2d) 300, 48 P.(2d) 962, and became final long before the entry in February, 1936, of the decree from which the present appeal was taken.

The heirs at law of the decedent other than W. J. Linstead, the contestant in the former proceeding, were Ed Linstead, Frank Linstead, and Margaret Holt Hauser. All were named as parties to the contest of the will, but Ed and Frank were nonresidents, were not served with citation, and did not formally appear therein.

It appears to be the contention of the appellant that, since Ed and Frank were not served with process and did not appear in the contest proceeding, they are bound by the order admitting the will to probate and are not in position to benefit by the judgment revoking it. Therefore, it is argued, the appellant is entitled on distribution to that portion of the share of Ed and Frank which would have come to him if the contest had not been instituted. In other words, the appellant insists that the contest of the will was a proceeding inter partes only and that the failure of Ed and Frank to join in the contest of the will rendered the order admitting it to probate binding upon them.

A will contest possesses some of the attributes of a civil suit, but it is essentially a probate proceeding. Estate of Patterson, 220 Cal. 370, 31 P.(2d) 197. As such it is in the nature of a proceeding in rem. Kearney v. Kearney, 72 Cal. 591, 15 P. 769. The res in the former proceeding involved the status of the will under which the appellant claims. It was therein determined, conclusively as far as the appellant is concerned, that the will is nonexistent. It must follow that there is no will under which the appellant may take. No question is here involved as to the right of a pretermitted heir or as to rights saved to persons under disability—minority or incompetency—pursuant to section 384 of the Probate Code. Under the facts appearing herein, when the probate of the will was revoked, it was revoked as to everybody. Scott v. Superior Court, 125 Cal.App. 513, 517, 14 P.(2d) 99. The cases mainly relied upon by the appellant, such as Samson v. Samson, 64 Cal. 327, 330, 30 P. 979, and Security Trust & Savings Bank v. Superior Court (Cal.App.) 69 P.(2d) 921, were concerned with the rights of persons under disability and are not applicable to the case at bar.

The decree is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; NOURSE, Justice pro tem.; EDMONDS, J.; SEAWELL, J.

---

9 Cal.2d 631

HEDDEN v. WALDECK et al.

WRIGHT v. HEDDEN et al.

L. A. 15500.

Supreme Court of California.

Oct. 1, 1937.

1. Fraud ⇨50

Fraud is never presumed, but must be established by proof; presumption being in favor of fair dealing.

2. Fraudulent conveyances ⇨8

Fraud will not be found in debtor's transfer of property under circumstances comporting equally with honesty and fair dealing.

3. Fraudulent conveyances ⇨273

The burden of establishing debtor's fraudulent intent in transferring property is on one seeking to set aside transfer.

4. Fraudulent conveyances ⇨298(4)

Evidence in action to quiet title to ranch *held* insufficient to support trial court's finding that defendant's deed of interest therein to his attorneys in payment of fees for services rendered in litigation involving it was fraudulent as given or accepted for purpose of preventing plaintiff from realizing on judgment rendered against defendant after execution of deed.

5. Attorney and client ⇨124

Attorneys had right to take client's real property in payment of reasonable fees for their services in successful litigation involving it, where client owned no other property.

6. Fraudulent conveyances ⇨57(3)

A deed of realty to grantor's attorneys in payment of reasonable fee for services rendered in litigation involving it may not be declared fraudulent as to party subsequently recovering judgment against grantor because latter was rendered insolvent thereby.

7. Attorney and client ⇨140

It is presumed that attorneys acted honestly in fixing their fees and asked only fees which they considered reasonable.

8. Fraudulent conveyances ⇨278(1)

Evidence that attorney, to whom client conveyed realty in payment of fee for services rendered, was client's son-in-law, raised no presumption of fraud in transfer.

9. Appeal and error ⇨984(5)
Attorney and client ⇨140

The trial court has wide discretion in fixing fees of parties' attorneys and may do so without hearing testimony of either expert or lay witnesses, and its award will not be disturbed by Supreme Court unless such discretion was abused.

10. Attorney and client ⇨141

The trial court abused its discretion in fixing fees of two attorneys for defendant in action to quiet title for services rendered in over 5½ years of bitter litigation, wherein parties' rights under contract to exchange realty involved for other property were sharply contested and defendant was charg-

ed with fraud, but was successful after nine days' trial and three appeals, at $1,000 each, in view of such attorneys' uncontradicted evidence that fees of about $7,000 charged by them were fair and reasonable.

11. Fraudulent conveyances ⚷87(1), 119

A deed conveying ranch to grantor's attorneys in payment of reasonable fees closely approximating value thereof for services in successful litigation involving it was supported by adequate legal consideration and cannot be set aside as preferential in action by grantor's judgment creditor.

* * *

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Fred F. Hedden against Fred A. Waldeck, J. Marion Wright, his wife, and others, in which defendants Wright filed a cross-complaint. From a judgment for plaintiff in part, defendant J. Marion Wright appeals.

Reversed.

Prior opinion, 65 P.(2d) 376.

Robert H. Dunlap, J. Marion Wright, and Owen E. Kupfer, all of Los Angeles, and Fred J. Heid, Jr., of Tulare, for appellant.

Paul A. Tschirgi, of Los Angeles, for respondent.

CURTIS, Justice.

Some time prior to the 27th day of July, 1922, plaintiff entered into an agreement with one Fred A. Waldeck, whereby he agreed to exchange several pieces of property, including one piece situated in the city of South Pasadena for the stock ranch of Waldeck and the personal property thereon in the county of Tulare. There was also a cash consideration of $5,000 to be paid Waldeck by Hedden. This agreement was duly executed by Waldeck and also by plaintiff but not by plaintiff's wife, and the transaction went into escrow. Before any deeds were executed to the various pieces of property involved in this exchange, the plaintiff became, for some reason, dissatisfied with the deal and refused to consummate it. However, it appears that under the agreement of exchange Hedden took possession of the stock ranch in Tulare county and Waldeck went into possession of the South Pasadena property and refused to deliver possession of the same to plaintiff after demand was made upon him by plaintiff. Upon plaintiff's refusal to perform said agreement of exchange, three actions were instituted by the parties to said agreement: (1) An action by Waldeck against plaintiff for specific performance of the agreement of exchange; (2) an action for forcible entry and detainer by plaintiff against Waldeck for possession of the South Pasadena property; (3) an action by plaintiff against Waldeck to rescind the agreement of exchange by reason of false and fraudulent representations alleged to have been made by Waldeck in respect to the stock ranch in Tulare county. These three actions were tried together in the superior court of the county of Los Angeles, and resulted in a judgment in each action in favor of Waldeck and against Hedden, the plaintiff herein. An appeal was taken from each of said judgments. On these appeals the judgment in the action for specific performance was reversed on the ground that a portion of the real property which the plaintiff had agreed to exchange for Waldeck's stock ranch was community property, and the wife of plaintiff had failed to sign the agreement of exchange. Waldeck v. Hedden, 89 Cal.App. 485, 265 P. 340. The judgment in the forcible entry and detainer action was affirmed in so far as it related to the issues of forcible entry and detainer, but reversed in so far as it determined that Waldeck was entitled to the possession of said real property, the appellate court holding that, inasmuch as the agreement of exchange was not binding upon the parties thereto by reason of plaintiff's wife's failure to sign the same, Waldeck could not remain in possession of the South Pasadena property. Hedden v. Waldeck, 89 Cal.App. 494, 265 P. 344. The judgment in the action for rescission was affirmed, the appellate court holding that there was no evidence of fraud on Waldeck's part in inducing Hedden to enter into the contract of exchange. Hedden v. Waldeck, 89 Cal.App. 497, 265 P. 345. Upon these decisions of the District Court becoming final, the attorneys of Waldeck presented their bills for legal services rendered and cash advanced for costs, less amounts paid them by Waldeck. Waldeck was without the means to pay the bills presented by his attorneys, and in settlement thereof deeded to them a three-fourths' interest in the stock ranch in Tulare county. The decisions in the three appealed cases became final in March and April, 1928, and the deed from Waldeck to Wright and Beebe was dated May 2, 1928, and recorded on May 7, 1928. Subsequently, George Beebe transferred his interest in said stock ranch to J. Marion Wright for the consideration of $800. Pending the litigation between Hedden and Waldeck the taxes on this ranch property had been allowed to go delinquent, and Wright, after the deed from Waldeck to Wright and Beebe, paid the sum of $717.81 in settlement of said delinquent taxes.

After the reversal of the judgment in the action for forcible entry and detainer, that action came on for trial in the superior court of the county of Los Angeles for the limited purpose of determining who was entitled to the possession of the South Pasadena property heretofore referred to. In the original complaint the plaintiff in said action asked for judgment in the sum of $500 damages for "waste and injury" and $300 for the use and occupation of said premises. It was upon this complaint that the judgment appealed from and reversed was rendered. No amendment was ever made to this complaint. It is quite evident, therefore, that at the time the stock ranch was conveyed to Wright and Beebe the amount of the demand against Waldeck in that action was only the sum of $800. Upon the trial, however, the plaintiff therein was given judgment for $6,000. This judgment was rendered on March 25, 1929. Execution was taken out on this judgment some two years after its rendition, and under said execution the right, title, and interest of Waldeck in and to the stock ranch situated in Tulare county was sold to the plaintiff herein, and on August 3, 1932, the plaintiff herein received a sheriff's deed to said ranch. Basing his claim of ownership under said sheriff's deed to said real property, the plaintiff, on January 3, 1934, commenced this action to quiet his title to said stock ranch against Waldeck, Wright, and Beebe, and three other defendants under fictitious names. Waldeck, Wright, and Beebe answered, denying plaintiff's claim of ownership, and Wright and wife file a cross-complaint in which they sought "to quiet the title of Wright to an undivided three-fourths of said ranch and of his wife to an undivided one-fourth thereof." The plaintiff answered this cross-complaint, setting forth the various steps through which Wright acquired his title to said ranch, and alleged that there was no consideration for the deed from Waldeck to Wright and Beebe and that said deed was given in fraud of the creditors of Waldeck and in contemplation of the rendition of a judgment against Waldeck in the action for unlawful possession of real property then pending. Upon these pleadings the action went to trial, and judgment was rendered quieting plaintiff's title to an undivided three-fourths of said real property, and quieting the title of cross-complainant Alice A. Wright to an undivided one-fourth of said real property. The validity of the judgment as to this undivided one-fourth of said real property in favor of Alice A. Wright is not questioned, but the defendant J. Marion Wright has appealed from that part of said judgment quieting plaintiff's title to an undivided three-fourths of said real property.

The basis of plaintiff's cause of action against the defendants and the ground upon which he claims to be the owner of said ranch is that the deed from Waldeck to Wright and Beebe was fraudulent and was executed with the intent to defraud his creditors and particularly to prevent the plaintiff from collecting his judgment of $6,000 out of property belonging to the defendant Waldeck.

It may be seriously questioned whether the pleadings sufficiently present the issue of fraud in the execution of said deed in the present action to determine the ownership of the real property in controversy. We will assume that the pleadings are sufficient for that purpose, and pass to the consideration of the contention of the appellant that the evidence is insufficient to support the finding of the trial court that the deed dated May 2, 1928, from defendant Fred A. Waldeck to J. Marion Wright and George Beebe, was made and delivered for the purpose and with the intent to delay and defraud the plaintiff, Fred F. Hedden, of his demand against Fred A. Waldeck in the action for the recovery of the possession of the South Pasadena property in which a subsequent judgment was rendered against Waldeck for the sum of $6,000.

[1-3] "Fraud is odious and is never presumed; it must be established by proof. The presumption always is in favor of fair dealing, except, perhaps, where confidential relations are involved. This presumption has been held to approximate in strength that of innocence of crime." 12 Cal.Jur. p. 816, par. 71. "Actual fraud is never presumed but must affirmatively be established. The evidence must amount to proof of fraud, and where the circumstances of the transfer comport equally with the theory

of honesty and fair dealing, fraud will not be found. The burden of establishing a debtor's fraudulent intent is therefore upon the one seeking to set aside the transfer. * * *" 12 Cal.Jur. p. 1057, par. 96. In the case of Levy v. Scott, 115 Cal. 39, 42, 46 P. 892, 893, in which this court reversed a judgment of the trial court setting aside a conveyance on the ground of fraud, we find the following statement: "So, in this case, while there are circumstances in and of themselves unusual, or perhaps in their nature suspicious,—circumstances upon which respondent builds a somewhat plausible 'theory' of collusion and fraud,—these circumstances comport equally with the theory of honesty and fair dealing, and there is nothing in them inconsistent with the claim that the transactions of plaintiff, from beginning to end, were upright and honorable."

In the case of Michaels v. Pacific Soft Water Laundry, 104 Cal.App. 366, 368, 286 P. 172, 173, in which the judgment of the trial court was reversed, the court said: "This rule is particularly applicable to a case such as we have here where the issue is fraud or good faith. The presumption against fraud, which approximates the presumption against crime (Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26), the presumption that private transactions have been fair and regular, and the presumption that the ordinary course of business has been followed (section 1963, subds. 1, 19 and 20, Code Civ.Proc.), are all evidence of good faith of the bank in this particular, and a contrary finding cannot stand without some evidence rebutting them."

In Best v. Paul, 101 Cal.App. 497, 498, 499, 281 P. 1089, 1090, in which the court affirmed a judgment in favor of the defendant in an action to set aside a deed charged to have been made to defendant fraudulently, the same rule is announced in the following language: "The presumption against fraud approximates in strength the presumption of innocence of crime [citing authorities], and this presumption is evidence supporting the finding that the conveyances were the free and voluntary acts of the grantor, and that they were not procured through the fraud or influence of respondent."

[4-8] Measured by the rule announced in the authorities just cited, and many others that might well be mentioned, that is, that fraud is never presumed, that this presumption approximates in strength the presumption of innocence, and that, where the circumstances of the transaction comport equally with the theory of honesty and fair dealing, fraud will not be found, we seriously question the sufficiency of the evidence in this action to support the finding of the trial court that the deed from Waldeck to Wright and Beebe was made for the purpose of defrauding the respondent or preventing him from realizing upon the judgment subsequently recovered against Waldeck.

In the first place, it will be noted that the deed from Waldeck to Wright and Beebe was executed after more than five and one-half years of what appears from the record to have been litigation of intense bitterness. In this litigation not only were the rights of the parties under the contract of exchange sharply contested, but charges of fraud were then made by Hedden against Waldeck, which had to be met and defended by his attorneys. In this litigation Waldeck, after a trial nine days in length, was successful in all three actions in the superior court. In the appellate court the judgment in his favor in the action for rescission on the ground of fraud was affirmed and Waldeck was exonerated of this serious accusation. The judgment in the action for specific performance was reversed, not for any fault of Waldeck but by reason of Hedden's failure to have his wife sign the contract of exchange which involved in part community property. In the third action, for unlawful entry and detainer, the judgment was affirmed as to the issues of unlawful entry and detainer, but reversed as to the right of Waldeck to possession of the South Pasadena property, in view of the invalidity of the contract of exchange due to Hedden's wife's failure to sign said contract. Some idea of the importance of this litigation as to Waldeck, the client of Wright and Beebe, is reflected not only from the issues involved in which Waldeck was called upon to defend against the serious charges of fraud made by Hedden, but also from the judgment in the action for rescission in which the trial court decreed the performance of the agreement of exchange as to the property described in said agreement and owned by Hedden at time of trial, but also gave judgment in favor of Waldeck against Hedden in the sum of $24,250, damages for failure to convey those portions of said property described in the agreement which Hedden was unable to convey to Waldeck by reason of his conveyance thereof to other persons after the execution of said agreement of exchange, and prior to the rendition of the judgment in the superior court. This litigation was concluded in the appellate courts on the 26th day of April, 1928, by a denial by this court of a petition for a transfer of the action for the possession of the South Pasadena property. Thereupon Wright and Beebe presented their bills for services rendered in said litigation. Wright's bill was for $4,000, less a few hundred dollars by reason of cash received by him from Waldeck in an amount exceeding costs which he had paid out in said actions. Beebe's bill was for $4,500, less $900, which Waldeck had paid him on account. The combined bills approximated the sum of $7,000. Another fact to be kept in mind and which has a material bearing, in our opinion, upon the intent of Waldeck, Wright, and Beebe in executing and accepting the said deed in payment of the attorneys' fees, is that at the date of the execution of said deed the only demand which Hedden then made against Waldeck in his action involving the South Pasadena property was the sum of $800, $500 for waste to said real property, and $300 for the possession thereof. Something like a year after the execution and delivery of the deed from Waldeck to Wright and Beebe the judgment of $6,000 was rendered in said action for the use and occupation of said real property.

Viewing this evidence in the light of the presumptions applicable to conveyances claimed to have been fraudulently entered into, we have no hesitancy in holding that it is insufficient to establish fraud on the part of those involved in the transaction. Their acts were perfectly consistent with the theory of honesty and fair dealing. The attorneys were entitled to a reasonable fee for their services. In case their client owned no other property, they had the right to take in payment the property in controversy, Hibernia Sav. & Loan Soc. v. Belcher, 4 Cal.(2d) 268, 48 P.(2d) 681, and the transaction may not be declared fraudulent for the reason that by deeding the property the client was rendered insolvent, Hibernia Sav. & Loan Soc. v. Belcher, supra. It is presumed that the attorneys, in fixing their fees, acted honestly, and only asked of their client fees which they considered reasonable. The trial of the cases in the superior court consumed nine days. The record on appeal was voluminous. The amount involved was large, and the issues, in addition to involving property of considerable value, seriously reflected on the honesty and integrity of their client. The attorneys are reputable members of the bar of this state, and then and during a number of years preceding said transaction enjoyed a lucrative practice. No attempt was made to assail their reputation for honesty and integrity. It is true that the evidence shows that Wright is the son-in-law of Waldeck, but this fact does not even raise a presumption of fraud. Best v. Paul, supra, at page 499 of 101 Cal. App., 281 P. 1089; Wilbur v. Wilbur, 197 Cal. 1, 14, 239 P. 332. The claim is made that Wright is holding the property conveyed to him by Waldeck for the use and benefit of the latter, but there is not one word of testimony in the record to support that claim and there is ample evidence to the contrary.

[9-11] We have not lost sight of the fact that the trial court fixed the fees of the two attorneys at $1,000 each. This was done without any evidence on the part of the plaintiff as to the question of the reasonableness of said charges and contrary to the evidence of both Wright and Beebe that the fees charged by them were fair and reasonable. While the court is vested with a wide discretion in fixing the value of fees of attorneys, and may do so without any evidence either by expert or lay witnesses, its award will not be disturbed unless there has been an abuse of discretion. City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 25 P.(2d) 224. After a reading and study of the entire record in this case in the light of the presumptions applicable to transactions like that involved here, we find ourselves unable to conclude that the trial court did not abuse its discretion in fixing the attorneys' fees of Wright and Beebe at the amounts named above. On the other hand, when we consider the importance of the litigation in which they were employed, the serious charge against their client, which they were called upon to defend, the time spent in preparing for trial and in the trials, as well as that spent in defending the appeals from the judgments in said action, and the long duration of the litigation through three courts of record of this state, we are not able to hold that the fees charged were unreasonable. They closely approximate the value of the property conveyed by Waldeck. There was therefore a legal, and we think also an adequate, consideration for the conveyance

to the attorneys. While the conveyance might have been set aside by proper bankruptcy proceedings by a creditor, it could not be so disposed of by an action of a creditor on the ground that it gave preference to one creditor over another. Hibernia Sav. & Loan Soc. v. Belcher, supra.

The record in our opinion lacks evidentiary support for the finding of the trial court that the deed from Waldeck to Wright and Beebe was fraudulent and that it was given or accepted for the purpose of preventing the plaintiff from realizing upon his judgment subsequently rendered in his favor against Waldeck.

The other questions discussed in the briefs of the parties are not of importance in view of our conclusion that the evidence is insufficient to support the charge of fraud.

The judgment is reversed.

We concur: WASTE, C. J.; EDMONDS, J.; SHENK, J.; LANGDON, J.; NOURSE, Justice pro tem.

---

9 Cal.2d 594

PEOPLE v. MANZO.

Cr. 4105.

Supreme Court of California.

Sept. 27, 1937.

1. Homicide 🔑253(3)

Evidence that defendant sought out man he claimed to be afraid of and entered into conversation which did not concern him and then shot victim while victim was backing away sustained conviction of murder in the first degree and supported implied finding that victim was killed without the provocation which would imply the malice required by statute to constitute murder (Pen.Code, §§ 188, 189).

2. Criminal law 🔑824(3)

In murder prosecution, if there is sufficient evidence upon which jury might return a verdict of manslaughter, an instruction defining manslaughter should be given even if not offered by defendant (Pen.Code, § 192).

3. Criminal law 🔑769

In trial of criminal cases, judge must instruct jury on all of general principles of law pertinent to the case.

4. Homicide 🔑309(3)

In murder prosecution, it is not error to fail to give an instruction on manslaughter where there is no evidence to support a verdict finding the defendant guilty of such crime (Pen.Code, § 192).

5. Homicide 🔑45

Provocation by words only, no matter how contemptuous or insulting, is not sufficient to reduce the offense of an intentional homicide from murder to manslaughter (Pen. Code, § 192).

6. Homicide 🔑309(3)

In murder prosecution, defendant's testimony which did not allege that shooting was occasioned by anger or passion, but established as excuse for crime that defendant believed victim was about to attack him with a knife, was insufficient to authorize an instruction concerning manslaughter, since such testimony merely presented issue of self-defense (Pen.Code, § 192).

7. Criminal law 🔑829(5)

In murder prosecution, where instructions offered by defendant and also an instruction offered by people fully advised jury concerning elements necessary to establish self-defense, offered instruction on self-defense which added nothing to those given was properly omitted.

8. Criminal law 🔑1170½(1)
Witnesses 🔑396(1)

In murder prosecution, where witness for defendant was confronted with alleged contradiction of testimony given on preliminary examination, witness should have been allowed to explain his testimony by answer to question of defendant's counsel as to whether he had understood the question at that time, but, where ruling sustaining objection to question of defendant's counsel was not prejudicial, reversal of conviction was not required (Code Civ.Proc. § 2052).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Canuto Manzo was convicted of murder in the first degree, and he appeals.

Affirmed.

Prior opinion, 64 P.(2d) 1112.

W. C. Dalzell, David Silverton, Anna Zacsek, and John S. Cooper, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

EDMONDS, Justice.

The defendant has appealed from a judgment of conviction of murder in the first degree, with punishment fixed by the jury at life imprisonment, and from an order denying a new trial. The killing is admitted, but it is claimed that the evidence is insufficient to sustain the verdict; and also that the court erred in failing to give the jury certain instructions and in the exclusion of evidence.

The crime occurred in the yard adjoining the homes of the defendant and his victim. Apparently there were a number of small houses on one lot. The defendant and his family lived in one of these houses. Jose Garcia, who was killed, and his family lived in another. Jose Enriquez, sometimes called Pipas, and Ignacio Vargas, single men, each occupied a small house in the group. Garcia was living at this place when the defendant moved there about three years before the crime occurred. They were on friendly terms until a dispute arose concerning a ditch which the defendant dug across the yard. Garcia objected to this ditch and asked the defendant to fill it up but the defendant refused to do so. At the time, according to defendant, each cursed the other and Garcia told the defendant that he was going to kill him.

The defendant testified that after this difficulty, which occurred about two months before Garcia was killed, he bought a revolver because he was afraid of Garcia. However, he said that he never carried it except at night, and although he saw Garcia on numerous occasions afterward, at no time did Garcia speak to him or make any attempt to attack him. While he claims to have twice seen Garcia carrying a dagger, he could not fix these times with any certainty.

On the night of the shooting, the defendant returned to his home about 3 o'clock in the morning. According to him, he heard voices in the yard near Vargas' house. With his gun in his pocket, he walked in the direction of the conversation. Before he reached the persons carrying on the conversation, he recognized Garcia's voice but continued toward them. The explanation of the defendant as to why he went on if he was afraid of Garcia was that he wanted to see if his brother was one of those taking part in the argument. He also testified that, although when he was some 25 or 30 feet away from the men he knew his brother was not there, he stood and listened to the discussion which was going on. At that time he saw that Enriquez and Vargas were talking to Garcia. Unquestionably both Enriquez and Vargas were drunk while Garcia had been drinking. The defendant's story of what occurred next is that, as he approached the three men, Garcia pushed Enriquez to one side and said to him (defendant), "You poche son-of-a-bitch, get away from there I am going to kill you." Speaking of the events which followed, the defendant said he then called Garcia the same names which Garcia had spoken to him, "or more"; that Garcia then came toward him and he took out his pistol and fired two shots, one to the ground and one to the side; that he fired a third shot with deliberate aim when Garcia was 5 or 6 feet away, and that Garcia then fell.

The defendant claims that he shot in self-defense; that at the time Garcia said he would kill him "he took the dagger out towards me," and that he saw the glitter of this dagger. However, no weapon was found on the deceased, and there is no evidence other than the statement of defendant that he was armed. Witnesses to the shooting testified that when Garcia pushed Enriquez, the defendant told him not to do so; that Garcia replied it wasn't any of his (defendant's) business; that the defendant then backed up from the rear of an automobile around which they were standing and drew out his gun and fired at the ground; that Garcia said he was not afraid of him or his gun or his bullets and did not change his position; but the defendant then fired a second shot at Garcia and the latter moved away from him toward the front of the car; that as Garcia was about 6 feet distant the defendant "just stood there and fired the third shot at him" with deliberate aim and then walked over to him and said, "Die you dirty Indian, you had it coming to you."

[1] This evidence is clearly sufficient to support a verdict of murder in the first degree. It shows that the defendant sought out the man he claimed to be afraid of and entered into a conversation which did not concern him and had nothing to do with his affairs. All of the witnesses to the acts of the defendant, including his own brother,

say that the deceased made no move of any kind toward the defendant, but that, on the contrary, Garcia was shot while backing away from the defendant. If that is what occurred, and the jury had a right to believe it did from the evidence before it, then Garcia was shot with "no considerable provocation," which implies the malice necessary to be present to constitute the crime of murder. Sections 188, 189, Pen.Code. This evidence also supports the implied finding of the jury that Garcia was killed without any provocation and under circumstances which show an abandoned and malignant heart. People v. Larrios, 220 Cal. 236, 30 P.(2d) 404; People v. Fleming, 218 Cal. 300, 23 P. 28.

[2-6] The principal point made by the defendant in connection with the instructions to the jury is that manslaughter was not defined. His counsel did not offer an instruction concerning manslaughter in the belief that it was a "general instruction" which would be considered by the court as having been offered. But included in an instruction offered by the People was the following taken from section 192 of the Penal Code: "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion." This portion of the instruction was stricken out by the trial judge and no instruction on the subject of manslaughter was given.

If there was sufficient evidence in the case upon which the jury might have returned a verdict of manslaughter, an instruction defining it should have been given even if not offered by the defendant. In the trial of criminal cases it is the duty of the judge to instruct the jury on all of the general principles of law pertinent to the case. People v. Scofield, 203 Cal. 703, 265 P. 914; 8 Cal.Jur. 309. But it is not error to fail to give an instruction on manslaughter when there is no evidence to support a verdict finding the defendant guilty of that crime. The record in this case does not show any facts which would warrant a belief that the defendant shot Garcia "upon a sudden quarrel or heat of passion." Provocation by words only, no matter how contemptuous or insulting, are not sufficient to reduce the offense of an intentional homicide from murder to manslaughter. People v. Bruggy, 93 Cal. 476, 29 P. 26; People v. Turley, 50 Cal. 469; People v. Jackson, 78 Cal.App. 442, 248 P. 1061. After the words were spoken by Garcia, the defendant, according to his own testimony, "didn't do anything, but immediately he (Garcia) took this weapon and he came on top of me. * * * As soon as he pushed Pipas he came towards me, took the dagger out towards me." It was then that the defendant took his revolver and "shot two shots to frighten him." Following these shots, the defendant took deliberate aim and fired again. At no time has the defendant claimed that the shooting was occasioned by his anger or passion. On the contrary, his excuse for the crime is that just before the shots were fired he believed Garcia was about to make an attack upon him with a knife or dagger and that he would be killed or suffer great bodily injury. While this testimony presented the issue of self-defense, it did not entitle him to an instruction concerning manslaughter.

That the jury determined the killing was not upon any sudden heat of passion but with premeditation is evident from its verdict. The jury was instructed as follows: "The unlawful killing must be accomplished with a deliberate and clear intent to take life in order to constitute murder in the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. * * * If the unlawful killing is done without the provocation and sudden passion which reduces the offense to manslaughter, * * * this is murder of the second degree, unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing the offense committed would, of course, be murder of the first degree." With those instructions, the jury returned a verdict of murder in the first degree. By refusing to reduce the crime to murder in the second degree, the jury found that the defendant acted with the deliberate and clear intent which constitutes murder in the first degree. Its verdict is amply supported by the evidence.

[7] The defendant also charges error because a proposed instruction on the subject of self-defense was refused. In other instructions offered by the defendant, and also in an instruction offered by the People, the jury was fully advised concerning the elements necessary to establish self-defense. The offered instruction adds nothing to those which were given and was properly omitted.

[8] During the trial, the defendant's brother testified that just before the shooting occurred he heard Garcia call defendant "a miserable poche" and say that "he was going to kill him." On cross-examination he was confronted with his testimony at the preliminary examination which the People claimed was a contradiction of what he had related on the witness stand. It was conceded that his former testimony was correctly stated in the transcript from which the district attorney quoted. The defendant's counsel then asked him whether he understood the question which he answered at that time. An objection to this question was sustained. While the question should have been allowed as one offering the witness an opportunity to explain his answer (section 2052, Code Civ.Proc.), it is evident that the ruling was not prejudicial to the defendant and affords no basis for a reversal of the judgment.

The judgment and the order denying a new trial are, and each of them is, affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

---

9 Cal.2d 666

PEOPLE v. BRITE et al.

Cr. 4098.

Supreme Court of California.

Oct. 6, 1937.

Rehearing Denied Nov. 3, 1937.

1. Homicide 🔑231

In prosecution for murder of three men by shooting and bludgeoning, mutilation, unnecessary shots, and other circumstances *held* to show abandoned and malignant heart from which malice aforethought could be implied (Pen.Code, § 188).

2. Homicide 🔑232

In prosecution for murder of three men by shooting and bludgeoning, mutilation, unnecessary shots, and other circumstances *held* to show deliberate, predetermined, and premeditated intention to kill (Pen.Code, §§ 187–189).

3. Homicide 🔑119

In prosecution for murder of three men shot and bludgeoned to death, extreme degree of cruelty employed by accused *held* not justifiable on grounds of self-defense.

4. Homicide 🔑9

The intention to kill and the act of killing may be as instantaneous as successive thoughts of the mind (Pen.Code, §§ 187–189).

5. Homicide 🔑105

In prosecution for murder of arresting officers who used billies after accused, whom officers came to arrest, manifested belligerent attitude and made menacing and suspicious movements under cover of bed clothing, *held* that officers were justified in using as much force as appeared reasonably necessary to enable them in safety to themselves to compel submission to arrest and that force used by officers was not excessive.

6. Arrest 🔑68

An arresting officer is not compelled to show warrant to person arrested unless required to do so (Pen.Code, § 842).

7. Homicide 🔑184

In prosecution for murder of officers who attempted to arrest accused, warrant of arrest issued by justice of peace of rural township *held* admissible over objection that warrant was void because it did not bear seal of justice in accordance with statutory amendments to Code of Civil Procedure requiring seal of "court" to be fixed to warrant of arrest, since justice of peace acted in capacity of magistrate in issuing warrant and amendments were not intended to require magistrate of rural judicial township to place seal on warrants of arrest issued by him (Code Civ.Proc. §§ 147, 153, as amended by St.1933, pp. 1825, 1826; Pen.Code, §§ 807, 813, 814, 871, 872, 1426, 1427, and §§ 806, 811 et seq., as amended by St.1935, pp. 873, 874, 1526).

[Ed. Note.—For other definitions of "Court (of Justice)," see Words & Phrases.]

8. Criminal law 🔑218(4)

Statutory amendments providing seals for justices' courts was intended to make process of justices' courts extend throughout state, eliminating requirement of certificate from county clerk on summons, writs of attachment, etc., when served outside the county, and requirement of seal is applicable only to such warrants of arrest as are authorized by statutes of Code of Civil Procedure and which have their origin in civil proceedings or quasi criminal matters, and seal is not required where warrant is to be served in county in which it was issued (Code Civ.Proc. §§ 1216, 1993, and §§ 147, 153, as amended by St.1933, pp. 1825, 1826).

9. Homicide 🔑242

In prosecution for murder of officers who attempted to arrest accused, evidence showed that officers had reasonable cause to believe that accused had committed felony of assault with deadly weapon with intent to kill, authorizing officers to make lawful arrest without warrant (Pen.Code, § 836, subd. 3).

10. Arrest 🔑63(4)

Reasonable or "probable cause" for believing that person arrested committed felony, "probable cause" being a suspicion founded upon circumstances sufficiently strong to warrant reasonable man in belief that charge is true, is a question of law, where there is no conflict in evidence (Pen.Code, § 836, subd. 3).

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

11. Criminal law 🔑823(6)

In prosecution for murder of officers who attempted to arrest accused, refused instruction that neither insulting language nor unsuccessful attempt by one under arrest to assault officer justifies an assault upon him by officer if no reasonably prudent man could conclude that attempt to assault could have been successful *held* sufficiently covered by charges given.

12. Criminal law 🔑134(4)

Denying motion for change of place of trial of murder prosecution on ground that prejudice and inflamed public opinion in county where killings were committed precluded fair and impartial trial there was not error, where supporting affidavits and counter affidavits were conflicting.

13. Criminal law 🔑121

Granting or refusing motion for change of place of trial rests in sound discretion of trial court.

14. Criminal law 🔑1150

Denial of motion for change of place of trial will not be reversed unless it clearly appears that trial court's discretion has been abused.

* * *

In Bank.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

John H. Brite and Coke Turner Brite, indicted under the name of Coke Brite, were convicted of murder, and they appeal.

Affirmed.

Horace F. Frye and Huston, Huston & Huston, all of Sacramento, and J. Everett Barr, of Yreka, for appellants.

U. S. Webb, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., and Joseph P. Correia, Deputy Dist. Atty., and James M. Allen, Special Prosecutor, both of Yreka, for the People.

SEAWELL, Justice.

By the indictment found and returned by the grand jury of the county of Siskiyou on November 5, 1936, defendants John H. Brite and Coke Brite, brothers, were jointly accused by said indictment, in three separate counts, with having, on August 30, 1936, in said county, murdered three persons, to wit, Martin Lange, Joseph Clark, and Fred Seaborn, respectively. Said Martin Lange and Joseph Clark, and each of them, were on said day deputy sheriffs of the county of Siskiyou, and Capt. Fred Seaborn was, or had been, connected with the military or naval service of the United States. At the time the last named met his death he was on his vacation, which he annually spent in hunting at the mountain home of Charles C. Baker, situate a short distance from the scene of the three homicides.

By said separate counts it is alleged that at the time of the commission of said homicides by the defendants they were armed with a deadly weapon, to wit, a rifle. It is further alleged therein that each of said defendants, by a judgment of conviction duly rendered and entered against them, respectively, was on December 22, 1925, in the superior court of the state of Arizona, in and for the county of Coconino, sentenced to and did serve a term in the state prison at Florence, state of Arizona.

The location of the place of the homicides is in the northern Siskiyou mountain range, near the source of tributaries of the Klamath river. The facts necessary to an understanding of the case presented require a brief description of the location of the particular place where the defendants were accustomed to and did on the evening of August 29, 1936, park their old model open-top Ford automobile and spread their bed for the night among a cluster of five trees, all of which were alders, with one or two exceptions. As a matter of convenience, the general area where the homicides were committed will be designated as "camp" or "the camp." Said camp was but a few feet from the water's edge of Horse Creek and approximately 8 miles from Horse Creek post office. The cabin in which the defendants and their parents lived was situated at the top of a mountain ridge, approximately a mile and one-half from the camp. A mountain trail, steep in stretches and which bore away from the creek, led to the cabin where defendants made their home with their parents. Mr. Charles C. Baker, sole survivor of the furious onslaught waged by defendants, which ended in the death of the two deputies and Capt. Seaborn, and who was the principal witness for the prosecution, lived with his wife downstream about a quarter of a mile from said camp. Baker's house was situate near said creek. The home of B. F. Decker, another important witness in the case, was upstream from Baker's residence approximately a quarter of a mile. Robert G. Lanning's house was 80 feet upstream beyond Mr. Decker's. He estimated the distance from his house to the camp to be 110 yards. Both of said houses were on the opposite side of the stream from the camp. The above persons were the only near neighbors living in the sparsely settled section of the locality in which the homicides were committed who testified directly as to matters which may be termed the res gestæ or as to matters which bore more or less directly upon the question as to whether the defendants were acting within their rights in taking the lives of the persons named in the indictment.

We have read the evidence in the case and we will not attempt to review it in all of its details, as related by the witnesses, but we shall make reference only to such portions as may be fairly said to support the jury's verdict upon which judgment was pronounced.

Little of the Brite family's background was adduced at the trial other than that the brothers had suffered a prior conviction of a felony, burglary, in the state of Arizona, at which time Coke was twenty years of age, and that they had since resided in the vicinity of the Horse Creek country for a period of more than a year. They gave as their means of livelihood mining and farming in a small way. The only record of trouble had with neighbors by either of the brothers consisted of an encounter which took place between Coke and Charles C. Baker, in the latter's dooryard, approximately two months before the tragic encounter of August 30th. Baker's version of the prior trouble was that Coke came to his home, when under the influence of intoxicating liquor, called him a son of a bitch, and cursed and abused him in the presence of his wife. He ordered him from his premises, and, instead of leaving, Coke followed him inside his yard and he then struck him with a club or stick. Whatever may have been the merits of the controversy, the fact remained that Coke harbored a feeling of resentment, if not unsatisfied revenge, against Baker, which was rekindled at the appearance of Baker and Capt. Seaborn near the Brite camp at about sunset, while in search of Baker's horse. Unquestionably, each entertained a feeling of hostility for the other. Baker did not know that the Brites were in the vicinity. This incident constituted the first chapter of the gruesome slaying of the two officers and Capt. Seaborn.

Mr. Baker testified that about 6 o'clock on the afternoon of August 29, 1936, he and his hunting guest, Capt. Seaborn, set out on foot to catch a horse which had strayed from the home premises. In doing so, they took the government trail and walked to a point where a less defined trail led to the creek. This trail took them to the defendants' camp. Capt. Seaborn was in the lead and was going to the creek for a drink of water when he noticed a parked car. He called Baker, who seemed to have been some few steps behind, and asked him whose car it was. Baker testified that he answered that it belonged to the Brites. The Brites, on the contrary, testified that Baker said that the automobile belonged to the Brites, "them sons of bitches that live up on the hill." There was a dispute as to whether Baker used the insulting reference made to the Brites and merely replied to Seaborn's query as he claimed, that the car belonged to the Brites, who lived on the hill. The Brites, who were probably in bed at the instant of approach, both having recognized Baker's voice, arose to their feet. Coke, who admitted that the presence of Baker angered him, yelled to Baker, according to the latter's testimony, and said, "Hey, Baker, what are you sons of bitches doing in our camp?" Seaborn was in the lead, going to the creek for a drink of water, and, according to Baker, both of the Brites rushed upon him, cursing and abusing him. Capt. Seaborn, in an effort to avoid threatening personal encounter with them, said: "Boys, I don't know you, and if we have said anything to offend you, I am sorry for it * * * we apologize." They both kept crowding him, striking at him. He was pleading with them to forgive him if he had said anything that had hurt their feelings. He was backing from them in the direction of where Baker had been standing. Baker said he saw them strike him several times. The witness said that one of the Brites, when near the car, threw something at Capt. Seaborn which he heard strike the creek bank. This, no doubt, was the quart bottle which had contained wine and which the Brites bought at the Horse Creek store earlier in the day. The bottle was afterward found at the locality in which the described object was thrown. When the Brites were following and fighting with Seaborn, the witness Baker testified that he was backing away, looking for something with which to protect himself and defend Seaborn. The defendants continued to follow Seaborn and Baker and both were retreating in the best order they could to avoid injury. Finally both of the Brites grabbed Seaborn, who was the nearest. Baker said he then went to the assistance of Seaborn and Coke struck him on the jaw and knocked him down. As Coke attempted to come upon him, he kicked him in the stomach and threw him back. In the meantime, Seaborn broke loose from John and grabbed Coke and threw him back from Baker. At this juncture, John struck Baker on the head with a good sized club, which stunned him. A running fight down the trail for some distance ensued, with Baker and Seaborn retreating in disorderly fashion. Curses and threats to kill which were uttered by the Brites greatly terrified Baker and Seaborn.

Coke Brite told a story different from the one related by Baker. He said he and John had gone to bed and were awakened by some persons talking. The first thing that he heard was someone asking, "Whose car is that?" The other person said, "That is Brite's car." The first voice said, "Who is Brites?" The second voice, which he then recognized as Baker's, said: "That is the sons-of-bitches that live up on the hill." He said he then hollered, "Hey, Baker," and jumped up out of bed. He saw the two men and walked up to Seaborn, whom he did not know, and asked him what he wanted there. John got up about this time. He did not know at the time where the other man was. He heard a noise in the bush and Baker stepped out, carrying a stick in his hand. John jerked it out of his hand after a tussle and struck him on the head with it. When John struck Baker, he (Baker) and Seaborn went down the trail. The Brites then came back to the bed, put on their shoes, and talked about going home. but decided it was too dark and they would wait until daylight. They went back to bed with their shoes on and were next awakened out of their sleep by the hooting of an owl from a nearby tree. John took a .32 automatic pistol from under the head of the bed and shot in the direction of the tree from which the hoots emanated. The ancient solitary bird's reign having been thus molested, it flew from its secret bower and the defendants again fell asleep.

John told substantially the same story related by Coke as to the earlier evening difficulty which preceded the homicides, with the additional statement that he asked Seaborn what he was trying to pull off when he saw him near the camp, to which inquiry he received no reply. In fact, neither Seaborn nor Baker, according to the testimony of the Brites, uttered a single word immediately before or during the above described encounter at the camp. John further supplemented his version of the difficulty with the statement that when Baker was surprised by the appearance of the Brites, he ran back on the trail, went into the brush, and came out with the club which John wrenched from his hands and with which John struck him. Both of the Brites testified that the blow administered to Baker by John was the only blow administered to Baker and that Seaborn was not struck at all. Baker and Seaborn, after they were able to withdraw from the attack of their assailants, made their way to Baker's house. Baker and Seaborn bore marks of having been roughed. Baker had a knot on his head of considerable size, a small cut on his cheek, and his clothing was torn. Seaborn displayed an injured eye, which became entirely closed from bruises which were inflicted by the Brites. The testimony of the Brites to the effect that no blows but one were struck by them and that no words were spoken by Seaborn or Baker was no doubt disbelieved by the jury, as the great preponderance of the evidence and the logic of the situation refute the contentions. The testimony given by Baker as to the several apologies that Seaborn made to the effect that if anything overheard by the Brites had hurt their feelings they offered sincere apologies carries an implication that something was said by Baker which pointedly expressed his dislike and opinion of the

Brites. This, however, would not justify an assault upon either.

Baker and Seaborn, upon arriving at Baker's house, decided to have the Brites arrested on a felony charge, and accordingly drove a number of miles in Seaborn's automobile to the home of Charles W. Rainey, Esq., justice of the peace of Oak Bar Township. The defendants were thereupon formally charged by a complaint sworn to by Fred Seaborn and filed against them, with the crime of assault with a deadly weapon, with intent to kill. A warrant of arrest was issued on said complaint or deposition. The warrant did not bear the seal of the court and, because of said omission, defendants claim that the warrant was void. Capt. Seaborn and Baker were insistent that the warrant be served during the night. Telephone communication with the sheriff's office at Yreka caused the two deceased deputy sheriffs to be detailed to serve the warrant of arrest. They arrived at the home of Justice of the Peace Rainey at about midnight, at which place Mr. Baker and Capt. Seaborn joined them. The warrant of arrest was delivered by Justice of the Peace Rainey to Deputy Sheriff Lange and all proceeded to Mr. Baker's home. From there, after a short stop, they proceeded to the camp on foot. All but Baker were supplied with small flashlights. Capt. Seaborn also carried a small Coleman lantern. The camp was reached at approximately 1 o'clock a. m. The officers carried their revolvers in holsters strapped under their arms in the usual fashion. They also wore regulation peace officers' badges. Baker and Seaborn were unarmed. The warrant as above described was in the possession of Martin Lange, and the directions indorsed thereon were that it might be served at any time during the night. The bed which defendants were in was very near the automobile on one side and not very far from the creek or road on the other. The road generally followed the meanderings of the stream. Again it becomes necessary briefly to refer to the testimony of Baker, the only member of the officers' party who escaped the fusillade of the rapid and deadly firing executed by John, aided and abetted and assisted by Coke, as to what took place at the time the officers and Baker and Seaborn approached the camp. The jury impliedly accepted the testimony of Baker as being substantially an accurate and true statement as to what occurred. If his testimony appears sufficient, together with the other facts and circumstances, to support the verdict, this court would not be warranted in disturbing the judgment on the ground of the insufficiency of the evidence.

Only so much of Mr. Baker's testimony as tends to support the judgment need be stated. It was substantially to the effect that Deputy Sheriff Lange and he walked side by side and Deputy Clark and Captain Seaborn walked side by side behind them as they approached the bed. The moon was shining, but the nearby trees diminished its light. When the party reached the automobile, the forms of the defendants in bed were discernible. Their heads were under the blankets. Flashlights were thrown on the bed, and Deputy Lange said, "Hello, boys, are you asleep?" The defendants began to curse and the witness described the movements of their bodies and arms as those of a person searching or feeling for something concealed under the bed coverings. To use the witness' language, they were "twisting and sliding down in the bed as if hunting for something." Mr. Lange said, "We are officers; you fellows are under arrest" or "Consider yourselves under arrest." One of the men replied that "there was no God damned officers can arrest us." One also said, "The hell you say you are officers; there can't no God damned officers arrest us." They commenced tumbling and sliding down in the bed. The witness illustrated to the jury the movements made by the defendants with their hands and arms. The defendants finally arose to their hands and knees. Both men were cursing. As John began moving toward the foot of the bed, Officer Lange struck him on the head with a "billie." Officer Clark struck Coke with his billie at the same time and quieted him down. Lange then stepped across the bed and started to put the handcuffs on John, but he moved his hands in such fashion as to balk the attempt. Mr. Lange said to him several times, "Be still; keep quiet. You are under arrest." Coke suddenly rose up, jumped and grabbed the billie, jerked it out of Mr. Lange's hand, and "rode him right on over in front of the car." The trees, automobile, and bed were grouped in a small area. The creek bank was very close to the outer side of the bed. Mr. Lange hollered for help. He said, "Take the brute off." Capt. Seaborn went to his rescue; Coke was on top of Lange. Seaborn struck him over the head with his flashlight or lantern a couple of blows and then grabbed him and threw him back. Coke then grabbed the 30/30 carbine from under the bed and, turning in the direction of Seaborn, fired. The witness then shouted, "Look out, he has a gun." Just as the gun fired, John grabbed the gun from Coke. The witness then ran from the scene. After the first shot, he heard Mr. Lange holler. Several shots followed the first and he heard Capt. Seaborn cry out. As the witness was crossing the creek on a log, he heard Coke say, "Look out, there goes one up the creek. Get that son-of-a-bitch, John, get him." As the witness got to the log, he saw the bark fly from the log, and he jumped into the water and crossed at a different point. Several shots were fired thereafter. In all he estimated the number to be seven or eight. The witness made his way to Mr. Decker's residence and later returned to his home. On returning to his home, he took a zigzag trail and, to his great consternation, found himself within 20 feet of the Brites. He turned and ran back and, as he did so, Coke said to John, "There is one of them. Get that son-of-a-bitch." The witness ran through the camp ground and observed the bodies of the dead upon the ground, and then made his way to his home.

Coke Brite was the first of the brothers called to the stand in their defense. He testified that they drank some wine and went to bed. John slept next to the car. One of the blankets under which they slept was sewed across the bottom and up one side to the mattress. Directing his testimony to the arrival of the officers, he said that he was awakened by someone throwing himself on top of him and, when he started to rise, he was struck across the nose and forehead; he tried to raise up but was struck three or four times and, when he was knocked down, someone jumped on him and hit him several times on the back of the head, and everything turned black. He thought he passed out. The next thing he knew he found himself standing in the water of the creek. His feet and arms were wet. When he walked out of the creek and got to the rear of the car, John was standing there leaning against the car with the 30/30 rifle in his hand. He testified that no one spoke a word during all the time he was being bludgeoned by the party who jumped on him while in bed, or at any time during the entire combat. When he approached John, he had a conversation with him and John struck at him with the gun. His actions were unusual. He couldn't say whether the stock of the gun was broken off at this time. Mr. Decker, a nearby resident, arrived at the scene of the shooting very soon after it had ceased. Coke remembered that he had heard Decker call his name before entering the camp and he told him to enter. The witness looked around at about the time Decker left and found John sitting on the running board of the car. He picked up John's hat and placed it on his head. He also picked up their .32 automatic pistol, a sack containing a half gallon jug of wine, a piece of bologna, and some groceries, and started up the trail for home. John did not act normal. He said several times that they were going the wrong way; he wandered off the trail; he wanted to know what Coke had done to him. John carried the rifle up the hill. Coke said he heard no one calling for help or the firing of guns or any unusual noises at any time, but he did hear Baker's voice at the time he was being beaten by some unidentified person cry out, "Pour it on that son-of-a-bitch. He is the one that hit me." This statement was made after he had repeatedly said that no word was spoken to anyone, and it bears the stamp of an afterthought. He said he did not see Baker at any time. Brites' dog was barking angrily and loudly during the tumult of the struggle, which was heard by neighbors a quarter of a mile distant. One witness described the shooting as a "roar of gun fire." The noise and din was so intense that it awakened neighbors out of their sleep. Before leaving for home, he saw several bodies on the ground and heard one of them groaning, but he did not recognize any of them. He heard no one say that the defendants were under arrest, or that the persons attempting to make the arrest were officers, and he did not recognize any one of the dead as a person whom he had ever seen before.

Upon reaching his parents' home, he made some changes of clothing and, after talking with his parents, he and John decided it was better to go to the mountains. Although Coke neither heard any shots fired nor saw anyone attempting to shoot, he thought that John might have done the shooting. They recalled the mobbing of a man named Johnson for slaying a peace officer of the county some time before and, moved by fears that public feeling might become greatly inflamed against them and that they might be similarly dealt with, if taken into custody, they took to the mountains to escape possibly the wrath of a mob. Eighteen or nineteen days thereafter, through the medium of their parents and the district attorney of Siskiyou county, they surrendered themselves to the law's custody and, as a precautionary measure against violence, they were imprisoned in the state's prison at Represa until aferwards brought to trial.

John Brite testified in substance as Coke testified as to the first encounter. He said the automatic .32 revolver and the 30/30 carbine were fully loaded and were placed at the head of the bed. Other cartridges were on his person. He was awakened by two men beating him with some heavy, hard instrument. He testified at the trial that he heard Baker say, after several blows had been struck, "I'll beat your God damned brains out." He did not know whether his head was under the covers when the beating commenced or not. He usually slept with his head under the covers. The two men were showering blows upon him while he was lying still in bed and he finally called to Coke, "My God, Coke, can't you help me?", but Coke did not reply. He next heard one of the men say, "Grab his arms, I will fix him." He had no memory as to when he arose from the bed. He heard no shots, saw no one use firearms, and had no knowledge as to the happening of anything that resulted in the death of any of said persons at the camp. He was first informed by Coke that three men were dead at the camp when at the corn field near their parents' home. John said he did not recover consciousness until he reached the corn field. He did not know that the stock of the rifle which he was carrying had been broken off during the life and death struggle. Both of the brothers made statements at other hearings which were contradictory in some material respects to their testimony at the trial, but we will not pause to point them out. Their accounts of, or failure to account for, the combat to which they were parties, in any rational or reasonable manner, no doubt caused the jury to distrust their testimony absolutely as to having been suddenly and violently assaulted in the manner related by them. Their testimony describing the conflict is from the beginning to the end so improbable and unreasonable, in the circumstances of the situation to which it related, as to be wholly devoid of convincing force or effect. The physical facts as they existed on the ground after the onslaught had ceased effectively refute the claim of want of knowledge on the part of defendants that a mortal combat had taken place, to which they were parties. The ineffable image of the havoc wrought by the defendants could not have been easily blotted from the minds of its chief actors.

The body of Deputy Sheriff Joseph Clark was found crouched forward with the head bent down and the broken stock of the Brite rifle was resting across his back. His coat was thrown up from the back and over his head. A bullet entered his body from the rear, through his shirt and underclothing. His coat, by reason of being pulled up over his head, showed no bullet puncture. In its course, the bullet severed the spinal column, shattered several vertebrae, and came out at the armpit, making a wound which admitted the hand of the autopsy physician from exit to entry. A copper jacket was found by the embalmer in his stomach. Another copper jacket was found in his right arm near the elbow. The physician was of the opinion that death ensued instantaneously. The body showed bruises or contusions at the base of the nose, chin, and hands.

Deputy Martin Lange's body showed two bullet wounds between the eyes; a wound below the right eye; a split in the lip and the ear; an abrasion at the upper point of the nose; upper jaw broken; and the entire frontal structure of the face crushed inward. The right ear was half severed from the head and a deep penetrating puncture wound, made no doubt by the hammer of the rifle used as a bludgeon, entered the skull. There was also a large wound on the back of the head and the left eye was protruding from its socket. The left leg near the hip was badly shattered by the entry of a bullet. The bony structure of the head was so badly shattered by gunshots and from the use of a heavy instrument as to make it impossible to follow the original bone structure. The facial mutilation was so extensive as to make identification impossible.

Capt. Seaborn's body showed a deep penetrating wound above the right eye. It was not made by a bullet. The hammer of the gun, used as a club, would make such a wound. The bone was depressed into the skull. There were two penetrating wounds in the right axilla (armpit). The upper one easily admitted the index finger into the lung and the lower one appeared to be a tear into the flesh which extended downward to the rib. The wound on the forehead caused a compound fracture of the skull. The bullet which entered under the arm separated from the copper jacket and both were embedded in tissue on opposite sides of the spinal cord. There was also a fracture of the upper part of the head.

We have set forth the methods of killing, both by shooting and by the bludgeoning of two of the victims in a most shocking manner, as indicative of the demoniacal fury with which the killing was executed.

[1-4] Murder is defined by the statutes of this state as the unlawful killing of a human being with malice aforethought. Section 187, Pen.Code. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Section 188, Pen.Code. All murder perpetrated by any kind of willful, deliberate, and premeditated killing is murder of the first degree. Section 189, Pen.Code. Uncontrovertibly the circumstances attending the killing showed an abandoned and malignant heart. The shooting of Officer Lange twice between the eyes, either of said shots being deadly, and a third shot through the thigh, and the added infliction of the deadly blows upon his head and face, as described by the evidence, is conclusive proof as to the deliberate, predetermined, and premeditated intention on the part of the defendants to kill. The same is true as to the killing of Seaborn and Officer Clark in perhaps a less merciless degree. The attempt to kill the fleeing Baker gives further support to the implied finding of the jury that the killing was done with a preconceived intent to kill, and with an abandoned and malignant heart. There was no room for justification of the extreme degree of cruelty which the defendants employed, on the grounds of self-defense. That the intention to kill and the act of killing may be as instantaneous as successive thoughts of the mind is an axiom of our criminal law. The law making available the right to kill in self-defense is too well understood to require restatement.

We have carefully read the evidence and are of the view that neither Capt. Seaborn nor Baker was armed. Mr. Decker and Mr. Lanning, the first to arrive at the scene of the killing, were of the opinion that they saw the butt end of a pistol on Seaborn's person. Mr. Lanning was not so positive in the matter as was Mr. Decker. The only light used by them at the scene was a searchlight, and they made no close inspection of the bodies. Seaborn had with him both a flashlight and a lantern and without doubt what Mr. Decker and Mr. Lanning saw was one of the flashlights that were used by the deputies or by the persons accompanying them. Clark's pistol was in his holster on his person. Lange's pistol had been removed from its holster and was found near the body of Seaborn, partially trampled into the soft earth. Baker was unarmed. Every pistol found at the scene was positively accounted for and none was traceable to Seaborn. Both Baker and Seaborn's son gave testimony which made it clear that Seaborn could not have been armed. An examination of the weapons found at the scene showed that none had been discharged. Two empty cartridge shells and two loaded ones were picked up on the grounds, which fitted the Brite rifle.

Mr. Decker testified that John did not seem to fully recognize him immediately after the shooting and asked him when he approached what he was doing in his camp. He thought he did not act in a normal manner and that his mind was not clear. He acted irrationally. He noticed blood on his face. The evidence did not convince the jury that either John or Coke received other than minor injuries. John testified to the effect that he was unable to wear a hat, that his head was sore for several days after the shooting from blows he had received, and that he had a cut about an inch long over one eye. The testimony was given such consideration as the jury deemed it merited. No major or serious injuries of any kind were inflicted upon either. Coke complained of an injured arm and head injuries. The claim that both were rendered oblivious to all that happened by reason of the beating they received at the hands of the officers is weakened by their asserted recollection of hearing prejudicial statements uttered by Baker during their periods of unconsciousness. These statements, made by Baker, they said, were the only words they heard spoken during the fatal encounter.

Naturally the defense made a vigorous effort to break down the testimony of Baker. To this end the defense called three citizens living in the vicinity who testified that Baker's reputation for truth, honesty, and integrity in the community in which he lived was not good. The prosecution called a much larger number who testified that it was good. His testimony stood the test of reason. The jury believed him and we see no substantial reason to discredit his testimony.

[5] The defense makes the point that, according to Baker, the officers were the first to use a weapon, to wit, billie. This is true, but the billies were used after all reasonable means had failed to induce the defendants to submit to peaceable arrest. The defendants manifested a belligerent attitude by the use of violent language and by their menacing and suspicious movements under cover of the bed clothing gave reason for the officers to fear that they were preparing to do that which they finally succeeded in accomplishing. As reasonable men, in the circumstances of the situation, the officers were justified in using as much force as appeared reasonably necessary to enable them in safety to themselves to compel submission to the law's processes. Baker's testimony does not justify the conclusion that the force used by the officers was excessive. The subsequent developments sustain his statement. The billies of the officers, one of which was pulled in two during the struggle and found on the ground, were flexible and made of soft leathern material. One end was bulb shaped and contained shot loosely placed in the bulb. The cavity of the bulb was not entirely filled with shot, but only to such an extent as to give it sufficient weight to serve its purpose. The flexibility of the bulb is designed to prevent it from cutting or lacerating the flesh. Its length was about 14 inches. A leathern wrist band was attached to one end of the billie. The billie used by Lange was pulled in two by Coke grabbing and holding to it, and Officer Clark's billie was found on the ground. Evidently neither was used longer than a few seconds.

Measured by the doctrine of appearances, the officers were entirely justified in resorting to the use of their billies, if the situation was as described by Baker. As the matter turned out, it is patent that they were not sufficiently vigilant for the protection of their lives, and they resorted to such means only as in their judgment appeared necessary to execute the law's command.

It is true that Baker testified that the officers used their billies several times on the defendants. He also testified that the blows were lightly administered at intervals in an attempt to compel submission to arrest, while defendants plainly showed, by their movements under cover, the purpose and plan of maneuvering themselves under cover into a position where they could reach their weapons and resist arrest with armed force. The jury no doubt impliedly found that the officers were fully justified, knowing what they knew and seeing what they saw, in using the means which they adopted, and that no unnecessary or excessive force was used by them. It is also true that Mr. Decker testified that he took hold of John very soon after the shooting for fear that he might shoot him and that he thought his conduct not rational. John had been through a terrible ordeal and it would be strange if the vehemence of the struggle had not left him in a somewhat confused mental state. He did admit to Decker, however, that he had killed all the men he saw lying on the ground.

It is claimed by Coke that he did not recover consciousness until he found himself standing in the water of the creek after the shooting had occurred. The creek was near the edge of the bed and close to the scene of the struggle. It was his claim that he was struck and knocked into the creek.

[6, 7] Appellants objected to and assign as prejudicial error the admission in evidence of the warrant of arrest, on the ground that it was void for the reason that it did not bear the seal of the magistrate who issued it. This objection is based on the amendments of 1933 (St.1933, pp. 1825, 1826) of sections 147 and 153, Code of Civil Procedure. The amended sections are listed in the code under part 1, title 1, chapter 7, article 6, Code of Civil Procedure, which provides for the "organization and jurisdiction" of "courts of justice" in general. Article 6 of said chapter 7 provides for seals of courts. Section 147, as it stood prior to the 1933 amendment, provided that the following courts shall have seals: (1) The Supreme Court; (2) the superior courts; (3) the police court of every city and county. Municipal courts were added in 1925 (St.1925, p. 953). The documents to which seals need be affixed, prior to the amendment, were: A writ; the certificate of probate of a will or of the appointment of an executor, etc.; and the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, etc.

By said amendment of 1933, the Legislature added to the list of courts required to have a seal, "The Justices' Courts." It also amended section 153 to conform with section 147 by providing that "Except as otherwise expressly provided by law, the seal of a court need not be affixed to any proceeding therein, or to any document, except" the proceedings or documents designated and set forth in the 1933 statutes, to which were added "a summons" and "a warrant of arrest." The addition of "a warrant of arrest" furnishes the basis of appellants' contention that the warrant of arrest was and is void for the reason that it did not bear the impress of the seal of the court. It will be noted that the Code of Civil Procedure, in providing for the use of seals, uses the word "courts" and in no instance do the Code of Civil Procedure sections refer to or mention a committing magistrate as an officer who shall have a seal. Then the Penal Code, throughout its numerous sections, ex industria prescribes the procedure which a magistrate must follow in cases "where an information is laid before a magistrate charging the commission of a public offense." He must examine on oath the complainant and any witnesses he may produce and take their depositions and cause them to be subscribed by the parties taking them. Section 811, et seq. Pen.Code, as amended by St.1935, pp. 874, 1526. Section 806, Penal Code, as amended by St. 1935, p. 873, provides: "The complaint is the allegation in writing made to a court or magistrate that a person has been guilty of some designated offense." A complaint issues in a justice's court where the offense charged is a misdemeanor committed within the jurisdiction of a justice's court, and has no relevancy to a deposition laid before a magistrate charging the commission of a felony. Section 1426, Penal Code, provides that "all proceedings and actions before a justice's or police court, * * * for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath," and "if the justice of the peace * * * * is satisfied therefrom that the offense complained of has been committed, he must issue a warrant of arrest which must be substantially" as prescribed by section 1427, Penal Code, the section from which the above quotation is taken. A justice of the peace, when acting as a court, is given the power of trying causes and rendering judgments of imprisonment upon conviction, but, when acting as a magistrate in the preliminary examination of a person accused by deposition of a public offense, he has no such power. The full limit of his power is, after examination, to hold the accused to answer at trial, unless from the examination it appears that no offense has been committed or there is not sufficient cause to believe the defendant guilty of a public offense, in which event the magistrate must order the accused discharged. Sections 871, 872, Pen.Code.

Section 807, Penal Code, defines a magistrate as "an officer having power to issue a warrant for the arrest of a person charged with a public offense." The following section, 808, declares the following persons are magistrates: "The justices of the supreme court; the judges of the superior court; the judges of the municipal court; justices of the peace; police magistrates in towns or cities." Section 814, Penal Code, prescribes the form of a warrant of arrest which the magistrate must issue and sign as magistrate, if he has "reasonable ground to believe" (Penal Code, § 813) that the defendant has committed the offense complained of. The sections of the Code of Civil Procedure upon which appellants rely make no specific reference to the sections of the Penal Code which have existed as the fundamental law of the state with respect to the functions of a magistrate since the adoption of the codes.

This court, in People v. Cohen, 118 Cal. 74, 50 P. 20, 21, had occasion to distinguish the powers of a magistrate from those of a court. Cohen was convicted of perjury alleged to have been committed in testifying falsely on the preliminary examination of one Sternberg on a charge of false registration and appealed from an order denying him a new trial. The reversal was placed on the ground that the demurrer to the complaint should have been sustained, as it did not appear from the indictment that the officer by whom the alleged false oath was administered had authority to administer the same. The allegation was that the defendant appeared as a witness before the Honorable William T. Wallace, judge of the superior court of the city and county of San Francisco, sitting as a magistrate in the examination of a felony charge then pending against said Sternberg. It was alleged that a duly appointed, qualified, and acting deputy county clerk of said city and county, and an officer authorized by law to administer oaths, and to administer an oath to the defendant Cohen, did administer to the said Cohen an oath in due form of law. It is probable that said deputy clerk was the deputy regularly assigned to the department of the superior court over which Judge Wallace presided. This court held that a judge of the superior court sitting as a magistrate was a creature of the statute and, as such, he does not retain and possess all the powers and attributes possessed by him as a judge of a superior court, with the same general right to have the attendance and services of the county clerk as when holding a session of the superior court or transacting judicial business at chambers; that it was not competent for the clerk to swear the defendant as though the proceeding had been one before the superior court. The office, it was said, "is purely a statutory one, and the powers and duties of the functionary are solely those given by the statute; and those powers are precisely the same whether exercised by virtue of one officer, or that of another." In short, it was held that when a judge of the superior court is exercising the functions of a magistrate he is not clothed with the powers the law confers upon him when sitting as a judge of the superior court. He is not designated by statute as judge or justice of a court and is not included as such within the list of those who shall place a seal to a warrant of arrest and there is no amendment of any of the sections of the Penal Code changing the long-established custom and practice by which persons against whom an information is laid before a magistrate shall be brought before him for examination. The arresting officer is not compelled to show the warrant to the person arrested, unless required to do so. Section 842, Pen.Code. In certain cases an arrest may be made without a warrant. By reason of the long-adopted system, as outlined by the penal laws of the state, and a failure to indicate a direct or positive intention on the part of the Legislature to revise by amendment the criminal code, we are of the opinion that the amendments to sections 147 and 153, Code of Civil Procedure, do not and were not intended to require a magistrate of a rural judicial township of the state to place a seal on warrants of arrest issued by him. There would be no reason in requiring magistrates to affix a seal and to exempt coroners, if the intention were to guard against the issuance of fictitious warrants or false impersonations. If such were the purpose, the statute should also have included "coroners." Sections 1517 and 1519, Penal Code, provide that if the jury finds that the person was killed by another under circumstances not excusable or justifiable by law, or that death was occasioned by criminal means, and the person responsible therefor is not in custody, "the coroner must issue a warrant, signed by him, with his name of office, * * * for the arrest of the person charged." Yet the coroner is not named in said section (153, Code Civ.Proc.) as an officer whose warrant of arrest must bear the seal of his office. Neither is a magistrate. All of which gives persuasive force to the contention that said section was not intended to apply to the general scheme of criminal procedure adopted by the criminal code and which remains unchanged. Certainly it is not likely that the Legislature would have overlooked so extensive and important a branch of substantive law.

[8] Respondent argues with much strength that, since the Legislature did not see fit to amend section 814, Penal Code, at the time it amended sections 147 and 153, Code of Civil Procedure, it was the intention of the Legislature that said amendments should apply only to such warrants of arrest as are authorized by sections 1216 and 1993, Code of Civil Procedure, and which have their origin in civil proceedings or quasi criminal matters. The argument that they were not intended to apply to a case in which the warrant is to be served in the county in which it was issued is given support by the note to section 147, Code of Civil Procedure (Gen. Laws Supp.1933, p. 41). It is there stated that the purpose of providing seals for justices' courts was to make the "process of the justices' courts extend throughout the state, eliminating the requirement of a certificate from the county clerk on summons, writs of attachment, etc., when served outside the county. The seal of the court should be sufficient identification."

The above note seems to offer a very convincing explanation of the purpose of said amendments. The warrant in the instant case was not served without the county in which it was issued.

[9, 10] We are of the view that the provisions of section 836, Penal Code, gave the officers who attempted to make the arrest authority to do so without a warrant

of arrest. Subdivisions 3 and 4 of section 836, Penal Code, provide that a peace officer may without a warrant arrest a person: "3. When a felony has been in fact committed and he has reasonable cause for believing the person arrested to have committed it. 4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested."

The evidence, as already detailed, amply supports the claim that there was reasonable cause to believe that the defendants had committd a felony. Seaborn had been violently assaulted and Baker had been knocked down and struck upon the head with a large club and pursued in the night some distance down a mountain trail by the defendants uttering threats to kill. Furthermore, the officers had talked with Baker and Seaborn as to the nature and violence of the attack and threats made by appellants and believed that they were dangerous men. They had also talked with the justice of the peace, who delivered to them a warrant of arrest charging appellants with an assault with a deadly weapon with intent to kill. Under the circumstances of the case, we are of the opinion that the officers could have made a lawful arrest without a warrant. The court instructed the jury that, if they found as a fact that Martin Lange and Joseph Clark were peace officers of said county, then, as a matter of law, the evidence shows that they had reasonable cause to believe that the defendants had committed a felony. There was no conflict in the evidence as to the grounds upon which the officers' belief was founded. "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Davis v. Pacific Telephone, etc., Co., 127 Cal. 312, 319, 57 P. 764, 765, 59 P. 698; Murphy v. Murray, 74 Cal. App. 726, 241 P. 938; Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611. Reasonable or probable cause is a question of law, where there is no conflict to be decided by the court. Collyer v. S. H. Kress & Co., 5 Cal.(2d) 175, 54 P.(2d) 20; Davis v. Pacific Tel. Co., supra.

Our conclusion is that the officers were attempting to make a lawful arrest at the time the homicides were committed by authority of a warrant regular in form and substances, and, further, that without said warrant there existed reasonable cause to believe a felony had been committed by appellants.

Appellants rely upon the rule announced in Wharton's Criminal Law, vol. 1, p. 785, stated as follows: "At common law if a warrant commanding the arrest of an individual in the name of the State have no seal, it is void. If an officer attempts to arrest the party named upon such authority, he proceeds at his peril, and is a wrongdoer; and if he be killed in the attempt by the party, the slayer is guilty of manslaughter, and not murder." It is upon the authority of the foregoing statement, supported by some jurisdictions, that appellants insist in the instant case that the warrant was void, and appellants could not have been convicted of a higher degree of homicide than manslaughter. There is a conflict of authority as to whether the omission of a seal when required by law to be affixed renders the warrant void or voidable, or amendable. The trend of modern authority seems to favor the proposition that such omission does not render void a warrant of arrest. In view of our holding that the warrant was valid, it becomes unnecessary to consider the proposition further.

[11] We have considered the instructions and find no reversible error either in refusing to give requested instructions or the giving of erroneous instructions. The charge to the jury covered every essential principle of law necessary for the jury's instruction. Appellants complain of the court's refusal to give instruction No. 7 in particular. We think appellants did not suffer prejudicial error because of such refusal. It dealt with the proposition that "neither insulting language nor an unsuccessful attempt by one under arrest to assault the officer justifies an assault upon him by an officer, if no reasonably prudent man could conclude that the attempted assault could have been successful." The language of the instruction is somewhat involved and in the face of several well-worded, comprehensive instructions, defining the appellants' rights in the circumstances of the assault, no prejudice was suffered. Instruction 23, which is but one of several given at the behest of appellants, reads:

"The Court instructs the jury that even though the defendants, at the time and place here in question, were subject to arrest by the officers and those acting in concert with them, the defendants nevertheless had a right to protect themselves from any unwarranted attack, if any, made upon them by the officers. The law is that every person has a right to resist an unlawful attack upon his person, whether that attack is made by a private citizen or an officer of the law, and the degree of force one may use in resisting such an attack, whether by private citizen or by a police officer, is governed by the force and danger of the attack. One unlawfully attacked in such manner as to reasonably appear to endanger his life or limb may resist even to the extent of taking the life of his assailant if that to him appears reasonably necessary. Accordingly, if you find and believe from the evidence in this case that the officers and those acting in concert with them did make an unlawful attack upon the defendants and that the attack was such as to make it appear to a reasonable person placed in the position of the defendants, that they were in immediate and imminent danger of losing their lives or receiving great bodily harm, or, if you have a reasonable doubt whether or not such a condition then confronted the defendants, you should give the defendants the benefit of the doubt and return a verdict of not guilty."

[12-14] Appellants earnestly insist that the court committed reversible error in denying their motion for a change of the place of trial to another county than Siskiyou, in which the homicides were committed. In support of said motion defendants filed affidavits supported by the affidavits of their attorney Horace F. Frye, Esq. It was averred in said affidavits that a fair and impartial trial could not be had in said county of Siskiyou for the reason that said officers who were killed were well-known officials and were universally held in high esteem and respect by the inhabitants of said county; that both the local and metropolitan newspapers had repeatedly printed in large type upon the first pages of their publications, which were circulated and read by the residents of said county, articles bitterly denunciatory of the defendants and written in a fashion which had a tendency to prejudice the defendants in the minds of the residents of said county and to incite the citizens of the county in which said homicides were committed to a high state of feeling and expressions of open hostility against defendants; that defendants were branded as cold-blooded murderers and it was openly stated by citizens of said county that defendants should be lynched when apprehended; that one newspaper printed an article in which it favored offering a reward for the apprehension of said defendants "dead or alive, but preferably dead." There can be no doubt that the homicides caused, as they usually do in such cases, a strong feeling of indignation against the defendants. Public feeling, inflamed by the press accounts of the killing, extended into other parts of the state far removed from the local county. The respondents filed fifteen counter affidavits to those filed by appellants in which the affiants averred that the defendants could have a fair and impartial trial, free from bias and prejudice, in the county of Siskiyou. Citizens of various callings and residents of various sections of the county, admitting in most cases that public feeling ran high for a short time after the killing, averred that it finally subsided and reached its normal level before the trial, which was some three months after the homicides had been committed, and that the defendants could have a fair and impartial trial; that the public feeling had entirely subsided.

We have examined the affidavits and cannot say, as a matter of law, that the trial court committed error by denying the motion for a change of the place of trial. The granting or refusing of a motion for a change of place of trial is essentially a matter which rests in the sound discretion of the trial court, who ordinarily is a resident of the county in which the venue lies and better able to pass understandingly on the motion than an appellate court would be. In People v. Hall, 220 Cal. 166, 30 P.(2d) 23, 25, 996, this court said: "Under the circumstances, and because of its proximity to and familiarity with conditions prevailing in the county, we are not prepared to say that the trial court abused the discretion vested in it when it denied the motion for change of venue."

A score of cases might be cited in which this court has repeated the rule that the denial of a motion for a change of place of trial will not be reversed unless it clearly appears to this court that such discretion has been abused. No such showing has been made.

The trial was conducted with commendable fairness, both in rulings on the admission of evidence and in giving instructions. We are not aware of any errors of law which would justify our interference with the judgments.

The judgments and orders as to each appellant are affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; NOURSE, Justice pro tem.

---

9 Cal.2d 615

PEOPLE v. CRAIG.

L. A. 15725.

Supreme Court of California.
Sept. 29, 1937.

Appeal and error 🔑781(5)

Where associate justice of District Court of Appeal appealed from judgment in quo warranto proceeding removing him from office, question whether vacated office was held by justice without right on his resignation from office became moot, and further proceedings could not be had.

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Quo warranto proceeding by the People of the State of California against Gavin W. Craig. Judgment for the plaintiff, and defendant appeals.

Appeal dismissed.

Prior opinion, 61 P.(2d) 934.

Daniel M. Hunsaker and Don M. Kitzmiller, both of Los Angeles, Albert A. Kidder, Jr., of Hollywood, and Mark L. Herron, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and L. G. Campbell and Eugene M. Elson, Deputy Attys. Gen., for the People.

Garret W. McEnerney, of San Francisco, M. C. Sloss, of Los Angeles, and Warren Olney, Jr., of San Francisco, amici curiæ.

Philbrick McCoy, of Los Angeles, amicus curiæ for the State Bar of California.

WASTE, Chief Justice.

During his term of office as associate justice of the District Court of Appeal of the Second Appellate District, defendant was indicted in the District Court of the United States for the Southern District of California and charged with the crime of felony, to wit, a violation of section 88 of title 18 of the United States Code (18 U.S.C.A. § 88), in that he, with certain other defendants therein named, did conspire to obstruct and impede the due administration of justice. The jury returned a verdict of guilty, and judgment was entered assessing a fine of $1,000 and ordering that the defendant be confined in jail for the period of one year. Pending appeal to the Supreme Court of the United States, the defendant continued in possession and occupied the chambers of the District Court of Appeal, used the furnishings of the same, the library facilities, records, files, and papers, and threatened to continue to do so. Thereupon this action in quo warranto was commenced by the Attorney General in the name of the People, based on section 996, subd. 8, of the Political Code, praying for a judgment declaring and decreeing that the defendant's office had become vacant, and he, unlawfully and without right, held and exercised a public civil office as associate justice of the District Court of Appeal of the Second Appellate District, Division Two, and praying that he be ousted and excluded therefrom.

Defendant answered the complaint, denying and putting in issue the allegations of the complaint. He alleged that he had never been impeached nor removed by legislative action from office as such associate justice, nor otherwise in the manner provided by law, nor at all. Judgment was entered that the office of associate justice of the District Court of Appeal, Second Appellate District, Division 2, became vacant by reason of the conviction of the defendant Gavin W. Craig, of a felony; that Gavin W. Craig had not, since the date of the conviction, had any lawful right to said public civil office; and that he unlawfully held and exercised the office and continued to hold the same without right. It was further ordered, adjudged, and decreed that he be removed from said office and excluded therefrom and from exercising or performing in any manner whatsoever or at all any of the duties or functions of the said office. Defendant appealed to this court, and the appeal has not yet been disposed of.

When the matter last came on for hearing before the court in bank, it was stated in open court by counsel for appellant, and was the fact, that the resignation of appellant had been forwarded to, and was actually in the hands of, the Governor of the state. The court thereupon, of its own motion, raised the question whether or not, by reason of such resignation, the office had become vacant, and the sole question presented by the action, to wit, that Gavin W. Craig unlawfully and without right exercised and held a public civil office, had become moot. On consideration of points and authorities filed by the parties on this question, the cause having been submitted, the court is of the view that the question has been settled and disposed of by the resignation of the alleged unlawful occupant, that the matter has become moot, and that further proceedings may not be had.

The appeal is therefore dismissed.

We concur: NOURSE, Justice pro tem.; SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.

GOLDBERG v. LIST et al.*

L. A. 16247.

Supreme Court of California.
Sept. 29, 1937.

Hearing Granted by Supreme Court
Oct. 28, 1937.

1. Sales 🔑481

Where third persons converted fixtures which had been purchased by conditional buyer under contracts of conditional sale, conditional buyer was entitled to recover from them full value of fixtures, though they had returned fixtures to conditional sellers and though buyer was in arrears in payments under conditional sales contracts (Civ. Code, §§ 3336, 3337).

2. Trover and conversion 🔑44

The rule that owners of special interest in property may recover for conversion only to extent of their interest applies only to cases where suit is brought against owner of remaining interest or his assignee.

3. Sales 🔑481

That conditional buyer of fixtures was in arrears in his payments did not bar him from recovering from third persons who converted fixtures and later turned them over to conditional sellers, in absence of any action on part of conditional sellers to take possession of fixtures, since mere failure of conditional buyer to make his payments on time does not change status of buyer and seller in absence of exercise of option by seller to declare forfeiture (Civ.Code, § 3337).

4. Sales 🔑481

That third persons who converted fixtures which were in possession of conditional buyer, who was in arrears in his payments, later turned fixtures over to conditional sellers, was no defense under statute to conditional buyer's claim for damages for conversion (Civ.Code, § 3337).

5. Sales 🔑481

Conditional buyer of fixtures, who was in arrears in his payments, was entitled to recover from third persons, who converted fixtures and later turned them over to conditional sellers, value of fixtures at time of conversion, with interest, or amount sufficient to indemnify him for loss which was proximate result of conversion and which proper degree of prudence on his part would not have averted, rather than value of fixtures at time they were installed (Civ.Code, § 3336).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Samuel Goldberg against Ruth E. List and others. From a judgment in favor of the defendants, the plaintiff appeals.

Reversed, and cause remanded for new trial on issue of amount of damages.

Prior opinion, 63 P.(2d) 1205.

Feinfeld & Feinfeld, Stick & Moerdyke, and John C. Stick, all of Los Angeles, for appellant.

John W. Carrigan and Harold E. Prudhon, both of Los Angeles, for respondents.

EDMONDS, Justice.

The plaintiff has appealed from a judgment in an action for the conversion of personal property and for the recovery of an amount paid for rent. Although the trial court found that certain personal property belonging to the plaintiff was converted by the defendants, it refused to give him damages therefor because it was being purchased by him under contracts of conditional sale which were then in default and the defendants had returned the property to the vendors. The judgment is in favor of plaintiff against the defendants Stevenson and List only for the sum of $175 for rent, but the parties apparently agree that this issue was correctly determined as the recovery of this amount is not challenged.

---

*For subsequent opinion see 79 P.2d 1087.

The appeal is presented upon the judgment roll alone. The findings of fact show that prior to the acts of the respondents which are complained of the appellant, as lessee of respondents List and Stevenson, was in possession of certain premises in which he was conducting a restaurant. The findings of fact also show that the appellant had installed in these premises certain fixtures and equipment which were being purchased by him under contracts of conditional sale; that while the appellant was in possession of the premises and the personal property, the respondents "without cause wrongfully, forcibly, unlawfully, willfully and maliciously entered upon and took possession of the said demised premises, together with the furniture, fixtures and equipment therein contained, against the will and without the consent of plaintiff * * * and converted said personal property to their own use, and refused to return same to plaintiff after demand therefor." A further finding is that after such conversion "said defendants delivered, upon demand of the vendors thereof, said personal property then being purchased by plaintiff on conditional sales contracts, to the various persons from whom plaintiff had purchased same" but that "by virtue of the plaintiff being in arrears in his payments under said conditional sales contracts, the demand for the possession thereof by the vendors, and the return by said defendants of said personal property to said vendors, that plaintiff did not suffer any damages by reason of the conversion of said personal property by said defendants."

[1, 2] Section 3336 of the Civil Code provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted." Section 3337 of the same code provides: "The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent." The defendants had no consent from the plaintiff to make any application of the property. The latter had a limited interest in it coupled with the right of possession, and this entitled him to recover its full value. Carvell v. Weaver, 54 Cal.App. 734, 202 P. 897. "The rule that the owners of a special interest in property may recover only to the extent of such interest applies only to cases where the suit is brought against the owner of the remaining interest or his assignee." Corey v. Struve, 170 Cal. 170, 149 P. 48, 49; Booth v. People's Finance, etc., Co., 124 Cal.App. 131, 12 P.(2d) 50.

[3] Nor does the fact that the plaintiff was "in arrears in his payments" under the conditional sales contracts bar him from a recovery. What rights the vendors had under such circumstances does not appear. Assuming that they might terminate plaintiff's rights in the property because of his failure to make payments as agreed, it is not claimed that they had taken any action to do so prior to the date the defendants took possession of it. "The mere failure of a conditional vendee to make his payments on time does not change the status of the parties in the absence of an exercise of the option to declare a forfeiture by the vendor. The clause in the contract allowing the vendor to retake the property is not operative in the absence of affirmative action on his part." Lacey v. Great Northern Ry. Co., 70 Mont. 346, 225 P. 808, 809, 38 A.L.R. 1331. Jones on Chattel Mortgages and Conditional Sales, vol. 3, § 1284.

[4, 5] The findings of the court are explicit that the acts of the defendants were wrongful and constituted a conversion of the property. Under the provisions of section 3337 of the Civil Code, the fact that the defendants, without the consent of the plaintiff, delivered it to his vendors, is no defense to the plaintiff's claim for damages. Hull v. Laugharn, 3 Cal.App.(2d) 310, 39 P.(2d) 478. He is entitled to damages in an amount to be determined under the provisions of section 3336 of the Civil Code. While there is a

finding that, pursuant to the terms of a lease made for a period commencing February 1, 1935, the plaintiff entered into possession of the premises and installed fixtures and equipment therein for his business "at a value of $2,500" this does not fix their value at the time of the conversion in July of the same year. The judgment is, therefore, reversed, and the cause remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of the plaintiff against all defendants for the amount of damages so found upon a determination of that issue and for the sum of $175 against the defendants List and Stevenson only.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

* * *

9 Cal.2d 624

CITY OF LOS ANGELES v. LOS ANGELES COUNTY et al.

L. A. 14897.

Supreme Court of California.

Sept. 30, 1937.

Rehearing Denied Oct. 28, 1937.

1. **Limitation of actions** 🔑11(1)

The sovereign's rights are not barred by lapse of time unless sovereign's immunity from bar is expressly waived by legislation.

2. **Limitation of actions** 🔑11(1)

The benefit of doctrine that sovereign's rights are not barred by lapse of time is expressly waived by statute (Code Civ.Proc. § 345).

3. **Limitation of actions** 🔑11(3)

A city's action against county to recover payments made by railroad, under franchise obtained from county prior to city's annexation of area in which railroad operated, was barred by limitations with respect to items that were neither claimed nor supplemented by accrual of other items, within a year after receipt by county (Pol.Code, § 4078, and § 4075 as amended by St.1915, p. 1185).

4. **Limitation of actions** 🔑11(3)

Municipalities are subject to statutes limiting time for commencement of actions.

5. **Counties** 🔑200, 201, 202

The phrase "any claim," as used in statute prohibiting board of supervisors from considering any claim not duly itemized, verified, and timely presented, includes claim for moneys held by the county belonging to another (Code Civ.Proc. § 345).

[Ed. Note.—For other definitions of "Any Claim," see Words & Phrases.]

6. **Counties** 🔑200, 203, 209

The Legislature may prescribe time and manner of filing claims against county and conditions under which county may be sued.

7. **States** 🔑191(1)

The state and its political subdivisions cannot be sued except as specially authorized by statute.

8. **Counties** 🔑209

Municipalities and other political subdivisions of state are bound by requirements of statutes permitting counties to be sued.

9. **Counties** 🔑200

Under statute limiting time within which board of supervisors may consider claim against county, a claimant may recover from county only items between which year has not elapsed, provided claim is filed within a year of last item (Code Civ.Proc. § 345).

10. **Municipal corporations** 🔑36(10)

A city's claim against railroad for percentage of gross receipts paid by railroad to county pursuant to franchises granted by county, after city had annexed territory over which railroad operated, constituted good cause of action, subject to defense of laches or estoppel, under principle that payment to person not entitled to receive payment will not bar recovery by person entitled thereto.

11. **Estoppel** 🔑62(8)

Municipal corporations 🔑36(10)

Where city, though disputing with county over right to receive percentages of gross receipts paid by railroad to county under franchises, permitted railroad to make such payments to county for 15 years without objection, city was barred by laches and estoppel from recovering from railroad amounts paid by railroad after city annexed territory wherein railroad operated.

12. **Estoppel** 🔑62(4)

Municipal corporations 🔑1025

A municipality is subject to rules of laches and estoppel where equity and justice require application of such rules.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Consolidated actions by the City of Los Angeles against Los Angeles County, the Los Angeles Railway Corporation, and another. From a judgment for plaintiff, Los Angeles County appeals, and, from a judgment for the railway corporation, the City of Los Angeles appeals.

Affirmed in part and modified in part.

Prior opinion, 64 P.(2d) 471.

Everett W. Mattoon, Co. Counsel, J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for defendant and appellant Los Angeles County.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and G. Ellsworth Meyer and Bourke Jones, Deputy City Atty., all of Los Angeles, for plaintiff, respondent and appellant City of Los Angeles.

Gibson, Dunn & Crutcher and Woodward M. Taylor, all of Los Angeles, for defendant and respondent Los Angeles Railway Corporation.

SHENK, Justice.

The City of Los Angeles sued the County of Los Angeles and the Los Angeles Railway Corporation in eleven actions to recover amounts aggregating $99,820.49. That sum represents percentages paid by the railway corporation to the county from the years 1911 to 1930 pursuant to eleven franchises granted by the county to the railway corporation, but which, by reason of the annexation to the city of the territory over which the railway corporation operated, should have been paid to the city. San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal.App. 77, 225 P. 304. Among other defenses, both defendants interposed the plea of the statute of limitations. The actions were consolidated for trial. The court dismissed the action as to the railway corporation and rendered judgment for the plaintiff against the county for the full amount of its claim. The county appealed from the whole of the judgment, and the city appealed from that portion of the judgment which dismissed the action as against the railway corporation.

Ten franchises were granted to the railway corporation between February 1, 1906, and October 22, 1909, and the eleventh in March, 1923. All were issued pursuant to the provisions of the Broughton Act. St. 1905, p. 777. Under the provisions of that act 2 per cent. of the gross receipts derived by the corporation from operations under each franchise was payable by it, beginning the sixth year after issuance thereof. Annexation to the city of a portion or all of the territory described in each franchise occurred prior to the time the first payment became due. All but two of the franchises and the ordinances authorizing them contained the provision that, whenever territory described therein should be included within any municipal corporation, all rights thereunder reserved to the county, except the right to the percentage of the gross receipts, should inure to the benefit of the municipality. After annexation, the railway corporation continued to pay to the county the percentages due under the act and the franchises. No notice or demand to do otherwise was served on it until May 6, 1930, when for the first time the city demanded payment of all future percentages becoming due. In November, 1931, three days prior to the filing of the actions, the city demanded of the railway corporation an accounting and payment to the city of all percentages theretofore paid to the county under said franchises. The city filed its itemized claim with the county board of supervisors on June 25, 1930. It also filed an amended itemized claim showing payments of $99,820.49 by the railway corporation to the county to and including the year 1930. On the appeal by the county the only question is whether the trial court correctly decided that none of the items of the city's claim was barred by any statute of limitations.

[1-3] The basis of the trial court's judgment is in the maxim "Nullum tempus occurrit regi." But wherever that maxim applies, as indicated by the authorities hereinafter cited, it refers only to rights of the sovereign. Such rights are not barred by lapse of time unless by legislation the immunity is expressly waived. The benefit of the doctrine as applied to actions brought by the state or for the benefit of the state has been expressly waived by the provisions of section 345 of the Code of Civil Procedure. We are not here concerned with any exception to the application of such a statute, for example, as relating to rights in public land, involved in County of Yolo v. Barney, 79 Cal. 375, 21 P. 833, 12 Am.St.Rep. 152; Board of Education v. Martin, 92 Cal. 209, 28 P. 799, and similar cases. Under the facts here presented, at least as between the city and the county, we are con-

cerned solely with a fiscal accounting, and not with a sovereign right as that term is usually interpreted. Therefore, if municipalities are bound by statutes of limitations at all, the City of Los Angeles must be held subject to them in the present case.

[4] The city contends that, inasmuch as words of a general statute do not apply to municipalities unless expressly so included, they are not affected by the provisions of limitation statutes, nor by the provisions of section 345 of the Code of Civil Procedure, which refers only to the state. It is argued that the reference to the state only excludes any intention to include municipalities. Assuming that the section should be so construed and that the immunity might in some instances be available to municipalities, it is well settled generally that municipalities are subject to statutes limiting the time for commencement of actions. Metropolitan Railroad Co. v. District of Columbia, 132 U.S. 1, 10 S.Ct. 19, 33 L.Ed. 231; Brown v. Board of Education, 148 Okl. 97, 298 P. 249; City of Centerville v. Turner County, 25 S.D. 300, 126 N.W. 605; Bannock County v. Bell, 8 Idaho 1, 65 P. 710, 101 Am.St.Rep. 140, and cases cited in note, p. 155 et seq.; 37 Cor.Jur. p. 715, and cases cited in note; McQuillin, Mun. Corp. vol. 6, p. 669, § 2653, and cases cited in note; Wood on Limitations, vol. 4, p. 169, § 53. In City and County of San Francisco v. Jones (C.C.) 20 F. 188, it was pointed out that, if the municipality is to be considered apart from the state and as a mere corporation, the statute of limitations applies without reference to section 345. It has been so held in this state. San Francisco v. Luning, 73 Cal. 610, 15 P. 311; City of San Diego v. Higgins, 115 Cal. 170, 46 P. 923; Dranga v. Rowe, 127 Cal. 506, 507, 59 P. 944; Clark v. City of San Diego, 144 Cal. 361, 77 P. 973; City of Fullerton v. County of Orange, 140 Cal.App. 464, 35 P.(2d) 397. In School Dist. No. 34 v. Joint School Dist. No. 34, 156 Okl. 5, 9 P.(2d) 771, 772, it was said, quoting from the syllabus in Brown v. Board of Education of City of Duncan, 148 Okl. 97, 298 P. 249: "Where a municipality brings action against another municipal subdivision of the state involving purely fiscal accounting between them, the complaining municipality will not be permitted to invoke the doctrine of governmental sovereignty in order to defeat the plea of the statute of limitations." The municipality, like any other person or corporation, must act diligently to preserve and protect its rights in a court of law or equity.

[5-8] The plaintiff contends that section 4075 of the Political Code as it read in 1930, when its itemized claim was filed with the board, is inapplicable as a statute of limitations. That section then provided and now provides in part: "The board of supervisors must not hear or consider any claim in favor of any public officer, person, corporation, company, or association against the county, nor shall the board credit or allow any claim or bill against the county or district fund, unless the same be itemized * * * duly verified * * * and is presented and filed with the clerk of the board * * * within a year after the last item of the account or claim accrued." (St.1915, p. 1185.) Section 4078 permits an action to be filed upon any rejected claim within six months after final action of the board, but not afterward. An additional paragraph was added to said section 4075 by Statutes of 1931, p. 197. The amendment prescribed that all claims payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon a tort liability, should be filed, presented, and acted upon as theretofore prescribed, and, in addition, stated the items required when the claim rested upon a tort liability. However, it is clear that the demand of the city was embraced within the language of section 4075 prior to the amendment. Whatever may have been the reason prompting the amendment of 1931, it must be said that moneys held by the county belonging to another were such items as were included in the language "any claim" as used prior to the amendment. There is likewise no merit in the contention that a municipal corporation should not be subject to the terms of the section. The Legislature had the power to prescribe the time and manner of filing claims against the county and the conditions under which the county could be sued. The rule recognized and applied is that the state and its political subdivisions cannot be sued except as specially authorized by statute. Hunsaker v. Borden, 5 Cal. 288, 63 Am.Dec. 130; Whittaker v. County of Tuolumne, 96 Cal. 100, 30 P. 1016; Colusa County v. Glenn County, 117 Cal. 434, 49 P. 457; Liebman v. Richmond, 103 Cal.App. 354, 284 P. 731; Union Bank & Trust Co. v. Los Angeles County, 2 Cal. App.(2d) 600, 38 P.(2d) 442; 7 Cal.Jur. pp. 555-557. The same reasoning which

makes general statutes of limitation applicable to municipalities governs in determining whether they must comply with conditions upon which litigants are permitted to sue a county. The history of judicial decision in this state does not disclose a general tendency to except municipalities from such restrictions. In fact, the cases show the contrary. In County of San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174, a two-year period of limitation contained in the statute (Stats.1893, p. 57), prescribing the conditions upon which the state may be sued, was applied. Other political subdivisions of the state are bound by the similar requirements of statutes permitting counties to be sued. Colusa County v. Glenn County, 117 Cal. 434, 49 P. 457.

[9] The present actions were duly commenced within six months after final rejection of the claim by the board of supervisors. Pursuant to the holding in the case of Welch v. County of Santa Cruz, 30 Cal. App. 123, 125, 156 P. 1003, a claimant is entitled to recover from a county only those items between which a year has not elapsed, provided a claim is filed within a year of the last item. It necessarily follows that the city under section 4075 of the Political Code may recover only such items. The amounts received by the county and the dates of their receipt were stipulated in the record. The defendant's exhibit purports to show what portions of these remittances were properly attributable to city operations. Assuming the correctness of its figures, all items in excess of $16,104.79 were barred by said section.

[10-12] On the appeal by the city it is contended that the trial court erred in dismissing the action as to the railway corporation. We may assume that a cause of action was stated as against that corporation, in accordance with the general principle that payment to a person not entitled to receive it will not bar a recovery by the person rightfully entitled thereto. However, on the record here presented we are of the opinion that in addition to the statute of limitations a principle of equity intervenes to bar the city from any relief as against the railway corporation. A municipality is subject to the rules of laches and estoppel in those cases wherein equity and justice require their application. City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189; County of Los Angeles v. Cline, 185 Cal. 299, 197 P. 67; Times-Mirror Company v. Superior Court, 3 Cal.(2d) 309, 44 P.(2d) 547; 10 Cal.Jur. 651-652; Dillon (5th Ed.) § 1194; McQuillin, Municipal Corporations, (2d Ed.) § 1818. On the trial of the action the plaintiff did not introduce any evidence to establish its allegations of fraud or bad faith contained in its complaints. The facts at all times were known to all the parties. The payments were made by the railway corporation as the franchises in terms required them to be made. Payment otherwise would have subjected the railway corporation to a charge of forfeiture of its franchises. It is true that as early as 1915 the controversy arose between the city and the county as to which was entitled to the percentages payable under the franchises. But the payments were thereafter made by the railway corporation to the county over a period of more than fifteen years under the county's claim of right to receive them pursuant to the specific terms of the franchises, and with the full knowledge of the city and without any objection on its part. The city made no demand upon the railway corporation and took no action with respect to the matter until the subsequent events hereinabove related. The record supports the judgment in favor of the railway corporation on the theory that the conduct of the city was tantamount to a representation on its part that it would not look to that corporation for payment so long as payments were made by it to the county, and that the entire controversy was a matter of fiscal adjustment solely between the city and the county. Under such circumstances it would be highly inequitable to subject the railway corporation to double payment of any items paid to the county before notice to the corporation that percentages under the particular franchise were to be paid to the city.

The portion of the judgment from which the plaintiff has appealed is affirmed. The judgment against the defendant county of Los Angeles is modified by reducing the principal amount to be recovered by the plaintiff to the sum of $16,104.79, and as so modified the judgment is affirmed, neither the city nor the county to recover costs of appeal.

We concur: WASTE, C. J.; EDMONDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; NOURSE, Justice pro tem.

9 Cal.2d 620

WIGHT v. ROHLFFS.

S. F. 15763.

Supreme Court of California.

Sept. 30, 1937.

As Modified on Denial of Rehearing Oct. 28, 1937.

1. Trusts ⚷44(1)

Evidence that, prior to execution of instrument declaring that decedent held in trust for plaintiff a one-third interest in olive grove, plaintiff executed deed and contemporaneous receipt to decedent, was insufficient, in light of evidence corroborating trust relationship and in absence of evidence explaining receipt or establishing payment mentioned therein, to overcome findings and judgment upholding trust, and hence decedent's estate was bound to account to plaintiff for one-third of profits from sale of grove.

2. Trusts ⚷365(2)

An action to enforce a creditor's claim against estate and to obtain accounting for plaintiff's share of profits from sale of realty which decedent had held in trust for plaintiff to the extent of a one-third interest was not barred by limitations or laches where plaintiff, living abroad, made his claim promptly upon discovery of facts justifying claim, and there was no showing of undue delay or prejudice resulting therefrom.

3. Appeal and error ⚷891

A motion made during pendency of appeal to introduce additional evidence was denied where proposed evidence would not have been determinative of case.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Wilder Wight against Alma Rebecca Rohlffs, as administratrix with the will annexed of the estate of Patrick Cahill, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

M. A. Ross, of San Francisco, for appellant.

H. Raymond Hall, of Oakland, for respondent.

LANGDON, Justice.

This is an action to enforce a creditor's claim against an estate, and to obtain an accounting. The action was twice tried, and the evidence on the main issues is conflicting and not wholly satisfactory, but we have reached the conclusion that it is sufficient to sustain the judgment.

In 1917 plaintiff and the decedent, Patrick Cahill, were the owners of an olive grove of some 82 acres in San Joaquin county, which they intended to subdivide and sell at a profit. Both parties had invested money in the enterprise, plaintiff's contribution amounting to about $4,600, the investment of Cahill being considerably larger. The property was encumbered by a first deed of trust for $20,000 and a second mortgage for $2,800. Plaintiff was partly incapacitated and Cahill was left in charge of the management and sale of the property. The foundation of the present action is an instrument executed by Patrick Cahill on December 9, 1918, reading as follows:

"I hold in trust for Wilder Wight one-third of the Cherokee Olive Farm, the description of which is the South 82.70 acres of the Southeast Quarter of Section 24, Township 3 North, Range 6 East, M. D. B. & M., in San Joaquin County, California, subject to a loan secured by a Deed of Trust to the Portuguese American Bank of San Francisco, California, for $20,000, and subject to a second mortgage to the Bank of Italy of Stockton, California, for $2,800, and subject to an accounting between us.

"Dec. 9, 1918.

"Patrick Cahill."

Various parts of the tract were sold from time to time until in 1925 the encumbrances were fully discharged and the remaining parcel was clear. This parcel was sold in 1929. Plaintiff had no knowledge of the sale until 1931, when Cahill died. His creditor's claim was thereafter made for an accounting of his share of the profits, based upon a one-third interest in the property. This was rejected, and the action was brought. The first trial resulted in judgment for defendant, but a motion for new trial was granted, and on the retrial judgment went for plaintiff. Defendant appealed.

Although some question was raised in the lower court as to the authenticity of the trust instrument, it was not successfully challenged, and the finding of the trial court that it was executed and delivered by the decedent, at its date, December 9, 1918, must stand. It necessarily follows that the estate of the decedent was bound to account to plaintiff for one-third of the profits of the venture.

[1] Defendant's main case was based upon a grant deed from plaintiff to the decedent, dated March 5, 1918, prior to the date of the trust instrument, and a contemporaneous receipt reading: "$5200. Oakland, California, March 5, 1918. Received from Patrick Cahill the sum of $5200 in payment of my one-third interest in the Cherokee Olive Ranch according to a deed this day executed. Wilder Wight." Defendant claims that this shows that Cahill paid plaintiff in full for his interest. But this would have the effect of nullifying the trust instrument of later date. There is nothing in the record to explain the receipt. Neither party produced evidence to show the circumstances under which it was made, and defendant did not produce canceled checks or other evidence to establish the fact of the payment mentioned therein. It is obviously inconsistent with the later trust instrument, the validity of which, as already stated, was established by sufficient evidence. Moreover, plaintiff, though prevented from answering many questions by reason of the statute making a party incompetent to testify in an action against a decedent's estate, as to matters occurring before death, produced witnesses corroborating the fact of the trust relationship. Josephe Merani, a realtor, who had known the decedent and his son Sumner Cahill for many years, testified that on several occasions, as late as 1925, Patrick Cahill acknowledged that Wilder Wight owned a one-third interest in the farm. He also testified that Patrick Cahill had declared that Sumner Cahill was his agent, that he attended to all his business, and that Sumner Cahill likewise had mentioned Wight's interest in the tract. A. J. Beckett, a contractor, testified that plaintiff had introduced Patrick Cahill as "his partner" without objection by Cahill. Henry R. Vail, an insurance broker, testified that he had written insurance for the parties for many years, and that in 1919 and 1925 Patrick Cahill had told him that Wight was still interested in the farm. We accordingly conclude that the evidence of the deed and receipt is not sufficient, on this appeal, to overcome the findings and judgment upholding the trust.

[2] Defendant raises the defenses of the statute of limitations and laches, but there is no showing either of undue delay or of prejudice resulting therefrom. Plaintiff, living abroad, made his claim promptly upon discovery of the facts justifying it. The decedent, as far as the record shows, never repudiated the trust.

[3] Defendant made a motion during pendency of the appeal to introduce additional evidence, which motion was continued for disposition with the appeal. In our view, the proposed evidence would not be determinative of the case, and accordingly the motion is denied.

No other points require discussion. The judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; CURTIS, J.; SHENK, J.

---

9 Cal.2d 606

SCOTT et al. v. SECURITY TITLE INS. & GUARANTEE CO.

L. A. 16216.

Supreme Court of California.

Sept. 28, 1937.

1. Appeal and error 🔑102

An order sustaining a demurrer is not appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

2. Mortgages 🔑209

Trustees named in deeds of trust or in mortgages with powers of sale are mortgagors' or trustors' agents for certain purposes and must act in good faith without fraud or deceit.

3. Mortgages 🔑209

Trustees named in deeds of trust or in mortgages with powers of sale are liable for damages resulting from their fraud, deceit, or lack of good faith.

4. Mortgages 🔑369(3)

A trustee's sale of trust property at inadequate price is not of itself sufficient to vacate such sale, but will support finding of fraud.

5. Mortgages 🔑209

Mortgagors' grantees who assumed deed of trust must allege, in their contract action against trustee to recover deficiency that grantees were required to pay, that trustee violated express or implied obligation that trustee assumed in accepting deed of trust.

6. Mortgages ⚿209

A trustee is not required to consummate sale of mortgaged property within definite time after being directed to sell property by beneficiary, in absence of contractual requirement to that effect.

7. Mortgages ⚿351

The trustee and beneficiary named in deed of trust, and not mortgagors, may control time of foreclosure sale.

8. Mortgages ⚿353

A trustee's foreclosure sale of mortgaged property cannot be had without lawful notice of sale.

9. Mortgages ⚿209

A complaint by mortgagors' grantees alleging that trustee, pursuant to beneficiary's directions on September 17, 1930, to sell property, gave defective notice of sale which invalidated purported sale of February 7, 1931, and that trustee's sale of April 11, 1932, resulted in deficiency which grantees were required to pay, did not authorize recovery of deficiency on ground that trustee did not exercise reasonable diligence in selling property or that trustee was grantees' agent, in absence of allegations of fraud, deceit, or unfair dealing by trustee.

10. Principal and agent ⚿60

An agent contracting to perform personal services does not undertake to render perfect service, and errors in judgment not due to want of care or diligence or to fraud or unfair dealing are not alone actionable.

11. Contracts ⚿1

Breach of contract rests upon failure to perform an enforceable obligation, and cannot exist if there is no enforceable obligation.

◆

In Bank.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Alva K. Scott and others against the Security Title Insurance & Guarantee Company. From a judgment for defendant, and from an order sustaining a demurrer to the complaint, the plaintiffs appeal.

Judgment affirmed, and appeal from order dismissed.

Prior opinion, 63 P.(2d) 307.

Harry W. Horton, of El Centro (Guy Richards Crump, of Los Angeles, of counsel), for appellants.

D. B. Roberts, of El Centro, and Charles L. Childers, of Los Angeles, for respondent.

NOURSE, Justice pro tem.

The above-entitled cause was transferred to this court after decision by the District Court of Appeal of the Fourth Appellate District, and upon further consideration of the issue involved therein we adopt the opinion of that court written by Mr. Justice Marks, reading as follows:

[1] "This is an appeal from a judgment entered after a demurrer to the complaint was sustained without leave to amend. Plaintiffs also attempt to appeal from the order sustaining the demurrer which is not appealable. Section 963, Code Civ.Proc., as amended by St.1933, p. 2472.

"The material allegations of the complaint may be thus summarized:

"That on March 22, 1928, L. T. Edwards and his wife were the owners of real property in Imperial county which they sold to T. E. and Jessie A. Topham; that Mr. and Mrs. Topham executed to G. C. Lord their promissory note for $5,000, dated March 13, 1928, due on or before three years, with interest at 7 per cent. per annum, payable semiannually. As security for the payment of the principal and interest on the note and taxes on the property, Mr. and Mrs. Topham executed a trust deed on the real property with defendant named as trustee and G. C. Lord as beneficiary. At the time of the execution of the deed of trust defendant in writing 'accepted the terms and conditions of said trust deed and the trust therein imposed and accepted all of the terms and conditions set forth and contained in said deed of trust and, among other things, agreed that upon the existence of any default in the terms and conditions of said promissory note, and/or trust deed, and upon instructions of said beneficiary or the successor in interest of said beneficiary G. C. Lord, the said defendant would duly and properly and in the manner provided in said trust deed and according to law sell and cause to be sold said real property to the highest and best bidder and that having once been instructed to so sell and exhaust said property as security, that the said defendant company would do and perform all things necessary to be done in conjunction therewith to cause a legal sale of the same to be made and had and to the highest and best bidder, with reasonable diligence and to do and perform all things necessary to make and cause the legal sale of the same to be had in accordance with the terms of said deed of trust and as provided by law.' About April 24, 1928, Topham and wife sold the real property to plaintiffs subject to the deed of trust and debt which they assumed and agreed to pay. About February 15, 1929, plaintiffs sold the property to Margaret M. King subject to the deed of trust and debt which she did not assume and agree to pay. Subsequently Margaret M. King sold the property to others than plaintiffs. On February 11, 1930, there existed a default in the payments to be made on the promissory note and Edwards duly executed and caused to be recorded a declaration of such default. On September 17, 1930, Edwards executed and recorded a second declaration of default in which he declared the full amount of principal and interest due and payable because of default in interest payments. Both declarations of default were prepared and caused to be recorded at the instance and request of Edwards. Immediately after the recordation of the second declaration of default Edwards authorized and directed defendant to sell the property in the manner provided by law and as soon as could be lawfully accomplished. Defendant published notice of sale of the property, and on February 7, 1931, offered it for sale and received bids the highest of which was $5,001 offered by Edwards. All bids were rejected, and on March 24, 1931, defendant instituted an action in the superior court of Imperial county to determine the validity of the purported sale. That court held that there had been no sale for the reason that defendant had failed to post, or cause to be posted, any notice of sale on the property. In April, 1932, defendant again caused the property to be offered for sale, and on April 11, the property was sold to Frank Wilson for $200. Immediately thereafter Edwards demanded payment of the deficiency from Topham and wife, and they demanded payment from plaintiffs who paid the deficiency amounting to $5,973 on May 4, 1932. Had the property been sold on February 7, 1931, it would have brought a sufficient amount to have paid all sums unpaid on the note secured by the deed of trust and plaintiffs would not have been compelled to pay any deficiency. Between February 7, 1931, when the property was first offered for sale, and April 11, 1932, when it was sold, 'the value of said property decreased and diminished and taxes accumulated upon said property so that the said property was worth only a nominal sum.' That by reason of the failure of 'defendant to comply with the terms and conditions of the trust which it accepted at the time of making said deed of trust, these plaintiffs have been damaged to the amount and extent of the deficiency they were required to pay and did pay.' Demand was made by plaintiffs on defendant for the deficiency, and upon the refusal of defendant to repay plaintiffs this action was brought to recover the amount paid by them.

"The complaint was filed June 15, 1934, more than three years after the property was first offered for sale. Defendant demurred generally and also on the ground that the cause of action was barred by the statute of limitations.

"Plaintiffs state that their cause of action is based on breach of the contract of defendant to sell the property in the manner provided by law, pointing out that it did not post on the property a notice of the first sale. They urge that this constituted such a negligent breach of its contractual duty as would give them a cause of action for the damages suffered by them, namely, the amount of the deficiency. They rely upon the following authorities as supporting their theory: Meath v. Porter, 9 Heisk. (56 Tenn.) 224; Lowell v. North, 4 Minn. 32 (Gil 15); Sherwood v. Saxton, 63 Mo. 78, and Melick v. Voorhees, 24 N.J.Eq. 305.

"In the case of Meath v. Porter, supra, action was brought to vacate a trustee's foreclosure sale under the power in a mortgage which sale was made in the absence and without the knowledge of the mortgagor who tendered the amount of the debt. The sale was set aside because the court felt that it was tainted with fraud.

"It appears in the case of Lowell v. North, supra, that a trustee had sold property for a sum much less than its reasonable market value, at a trustee's sale held without having given the required notice of sale. Suit was brought to recover a deficiency, and the judgment in favor of the creditor was reversed on appeal, the Supreme Court of Minnesota remarking that the price bid was less than the property should have been sold for had the sale been 'made fairly and in good faith.'

"The case of Sherwood v. Saxton, supra, involved what amounted to fraud and collusion on the part of the trustee in selling incumbered property. At the sale the trustee accepted a bona fide bid of $1,746 for property reasonably worth $2,000. By agreement between the trustee and the bidders the latter were released from their obligation to pay the amount of their bid and a second trustee's sale was held at which the property was sold for $940. The trustor brought suit for damages and a demurrer to his complaint was sustained. The judgment was reversed on appeal with the statement that 'the arrangement made with the first bidders was wholly wrong and indefensible. Allow such a proceeding, and trustees will then have the power to relieve men from bad bargains or combine with persons who think it will be to their advantage not to comply with their contracts; and instead of being agents protecting the interest of the debtor and creditor, they will be sacrificing them.' It is evident from the facts that such a flagrant breach of trust is disclosed on the part of the trustee that both fraud and collusion on his part were reasonably inferred.

"Melick v. Voorhees, supra, presents a different state of facts and proposition of law from those involved in this case. By the express terms of his trust the trustee in that case was prohibited from selling the trust property without consulting with and obtaining the consent of two others. This he failed to do and was held liable for the deficiency between the selling price and the reasonable market value of the property.

[2, 3] "These cases are easily distinguishable from the instant case. In the first three fraud on the part of the trustee may be deduced from the facts. Trustees named in deeds of trust, or in mortgages, with powers of sale are, for certain purposes, agents of the mortgagors or trustors. The trustee must act in good faith and must not be guilty of fraud or deceit. Acting otherwise he will be held to respond in damages resulting from his lack of good faith or his fraud or deceit. Sandler v. Silk, (Mass.) 198 N.E. 749. In the instant case there is no intimation that the trustee acted in bad faith or was guilty of any fraud or deceit. The complaint is also barren of any allegation from which may be drawn the inference of bad faith, fraud, or deceit.

[4] "Selling the trust property at an inadequate price is not of itself a sufficient ground to vacate a trustee's sale. Meyer v. Zuber, 92 Cal.App. 767, 268 P. 954; Hopkins v. J. D. Millar Realty Co., 106 Cal.App. 409, 289 P. 221; Freedman v. Peoples Nat. Bank, 291 Mass. 168, 196 N.E. 846. It is, however, a circumstance tending to support a finding of fraud if one be made by the trial court. There is no allegation in the complaint that an inadequate price was received from the property when it was actually sold on April 11, 1932. To the contrary, it is affirmatively alleged that at that time the property 'was only worth a nominal sum.'

"An additional reason exists why the cases just cited cannot be controlling here. In three of the four cases (Sherwood v. Saxton, supra, being the exception) sales by the trustees were actually made of the trust property and the claims of the plaintiffs were based on wrongful sales. In the instant case there was no wrongful sale because no sale was made on February 7, 1931, the occasion when the defective notice was given. Plaintiffs cannot base their cause of action on a wrongful sale following an insufficient notice because no such sale was had. If their cause of action is to be supported, it must be because no sale was made following the defective notice. In the Sherwood Case the action of the trustee was so clearly fraudulent that no other reason is necessary to support the conclusions of the court there expressed.

[5] "Regarding the action, as plaintiffs would have us, as one for damages for breach of the terms of a written contract, we must determine what, if any, obligation of the contract was violated by defendant. 'In order to maintain this action, therefore, it must appear from the allegations of the complaint that the defendant has violated some obligation, either express or implied, which it assumed in accepting the trust mortgage.' Patterson v. Guardian Trust Co., 67 Misc. 614, 122 N.Y.S. 773, 776.

[6, 7] "The only allegation of the complaint bearing upon the duties and obligations assumed by the trustee is contained in the paragraph which we have already quoted whereby it is alleged that the defendant agreed to cause a legal sale of the property to be made with reasonable diligence after being required to do so by the beneficiary. It is not disputed that within a reasonable time after demand was made upon it to foreclose the deed of trust defendant gave a notice of the sale and actually received bids on February 7, 1931. It was then discovered that the notice of sale was probably defective. This question was submitted to the superior court of Imperial county which held the notice defective and the purported sale void. No appeal was taken from this judgment and it has become final. A new notice of sale was given and a legal sale made. Under these circumstances we cannot hold that the sale was not made with 'reasonable diligence,' especially in view of the fact that the complaint fails to allege that the trustee agreed to consummate the sale within a definite time. We have been cited to no law placing such an obligation on the trustee in the absence of contractual requirements. See Walker v. Teal (C.C.) 5 F. 317. The trustors are given no right of control over the time of a foreclosure sale. They can neither dictate when the notice of default shall be recorded nor when the sale shall be held. Those matters are within the control of the beneficiaries and the trustee, with the possible exception that, if the trustee should fail to act at all when required to do so, the trustors might perhaps apply to a court of equity for relief. Here the trustee did not fail or refuse to act, but acted. It is true that it made a mistake which it corrected. A legal sale of the property was had, and in the entire absence of any suspicion of bad faith, fraud, or deceit we must agree with the trial court in its conclusion that the trustee performed the obligations of its contract and acted with reasonable diligence.

[8, 9] "We are supported in this conclusion by the case of McGreevey v. Charlestown Five Cents Savings Bank (Mass.) 2 N.E.(2d) 543, which is controlling here. In that case the plaintiff debtor sought to recover damages from defendant for a foreclosure sale held without due and legal notice. The trial court held for the defendant, and the judgment was affirmed, for the reason that the attempted sale without legal notice was void and a nullity, and that as no sale was made under the defective notice no damages could be recovered whether that action be considered one for breach of contract or sounding in tort. See, also, Guay v. Brotherhood Bldg. Ass'n, 86 N.H. 344, 168 A. 900; Guay v. Brotherhood Bldg. Ass'n, 87 N.H. 216, 177 A. 409, 97 A.L.R. 1053.

"In California the same rule prevails as in Massachusetts to the effect that without lawful notice no trustee's foreclosure sale can be had. United Bank & Trust Co. v. Brown, 203 Cal. 359, 264 P. 482. It follows that the attempted sale of February 7, 1931, was a complete nullity. The sale of April 11, 1932, was the only sale conducted by the trustee. This sale was valid and regular. As defendant was under no legal obligation to conduct the sale at an earlier date, and as plaintiffs had no control over the time of sale nor right to fix its date, their complaint does not state facts sufficient to constitute a cause of action in the absence of allegations of fraud, deceit, or unfair dealing on the part of defendant."

[10, 11] The case rests upon these accepted principles. Since the complaint is founded upon an alleged breach of contract to make a valid sale of the property on February 7, 1931, and since the contract did not obligate the defendant to sell at that time, or on any other particular date, the complaint fails to plead a cause of action in breach of contract. If the plaintiffs had a remedy it was one resting in tort for negligence in the performance of the services under the trust, but no such cause of action is pleaded. Assuming an agency between plaintiffs and defendant, a relation most favorable to plaintiffs, but one which the defendant does not concede, still the complaint fails to state a cause of action. An agent contracting to perform personal services does not undertake to render perfect service. Errors in judgment not due to want of care or diligence, or to fraud or unfair dealing, are not alone actionable. Here the complaint pleads no facts disclosing a breach of a contract of agency. The plaintiffs had no right to demand a sale at any time, and no right to fix a date of sale. If any duty rested upon defendant to sell in February, 1931, it was a duty which these plaintiffs could not enforce. Breach of contract rests upon a failure to perform an enforceable ob-

ligation, and, if there is no such obligation, there can be no breach.

The judgment is affirmed, and the appeal from the order is dismissed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; EDMONDS, J.; LANGDON, J.

BACCIOCCO et ux. v. CURTIS et ux.*

Sac. 5094.

Supreme Court of California.

Sept. 27, 1937.

Rehearing Granted Oct. 25, 1937.

1. Judgment 🔑715(2)

In action to set aside conveyance and to subject property to judgment obtained by plaintiffs in action in unlawful detainer and for rent, defense that plaintiffs, prior to unlawful detainer action, had orally released defendants from liability in consideration for transfer of personalty, was barred under doctrine of res judicata, where defendants had in unlawful detainer action unsuccessfully pleaded same release but on different consideration, since release was matter in issue more than consideration (Civ.Code, §§ 3439, 3440, 3442).

2. Judgment 🔑744

Where existence, validity, or construction of contract, lease, conveyance, or other obligation has been adjudicated in one action, it is res judicata when it comes again in issue in another action between same parties, though immediate subject matter of two actions be different.

3. Judgment 🔑713(2)

Where issue has been determined in former action, it is binding notwithstanding that parties litigant may have omitted to urge for or against it matters which, if urged, would have produced opposite result, since, when issue has been litigated, all inquiry respecting it is foreclosed, not only as to matters heard, but as to matters that could have been heard in support of or in opposition thereto.

4. Judgment 🔑619

Statutory rule that, where defendant omits to set up counterclaim on cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, neither defendant nor assignee can afterward maintain action against plaintiff therefor, should apply to plea of satisfaction in unlawful detainer action when counterclaim or cross-complaint is not permitted (Code Civ.Proc. § 439).

5. Judgment 🔑619

Where defendant sat by during unlawful detainer action withholding information from his counsel and from court that he had entered into alleged agreement with plaintiffs to transfer personalty in consideration for cancellation of indebtedness to them for rent, defendant could not, in action to set aside conveyance to his wife as fraudulent and enforce judgment obtained in unlawful detainer action for rent, claim that failure to set up defense was due to fraud and deception of plaintiffs.

6. Landlord and tenant 🔑184(2)

Where lease provided for payment of $5,000 as "bonus" for lessors' execution of lease, that lessee, so long as there was no default, would receive sum equal to 6 per cent. interest on the $5,000, and that in event of full performance of lease $5,000 would be credited on rent for last five odd months of term, there was no room for judicial interpretation, and lessors would be deemed to have assumed no obligation to repay under any circumstances except on full performance of terms of lease.

7. Contracts 🔑170(1)

Where terms of contract are ambiguous, court may consider evidence of construction made by parties to determine their intention when that is inaptly expressed in contract, but when contract is clear courts will not substitute their interpretation when such course would establish contract radically different from one made.

8. Judgment 🔑619

In unlawful detainer action and for rent, lessee should have pleaded alleged agreement with lessors to apply on rent bonus paid by lessee to lessors for execution of lease, and was precluded from raising such agreement as defense to action by lessors to set aside conveyance by lessee to wife as fraudulent and to subject property to judgment obtained by lessors in unlawful detainer action.

---

*For subsequent opinion see 82 P.2d 385.

9. Judgment ⚷619

In action to set aside conveyance as fraudulent and to subject property to judgment obtained by plaintiffs in foreclosure action, defendants could not set up defenses which would have constituted valid counterclaims in foreclosure action, but were not pleaded, in absence of allegation that plaintiffs had induced defendants not to tender available defenses in foreclosure action (Code Civ.Proc. § 439).

10. Appeal and error ⚷173(9)

Where defendants failed to plead and prove fraud of plaintiffs as excuse for failure to raise available defenses in prior action against them by plaintiffs, contention of defendants on appeal that fraud of plaintiffs prevented them from having their day in court in prior action was not sustainable, since fraud may not be presumed but must be pleaded and proved.

◆

In Bank.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by L. A. Bacciocco and wife against W. H. Curtis and wife, wherein the named defendant filed a cross-complaint. From a judgment denying plaintiffs any relief and in favor of the named defendant on his cross-complaint, the plaintiffs appeal.

Judgment reversed, and cause remanded for new trial.

L. C. Smith, of Redding, and J. Elmer Barricklo and Preston & Preston, all of San Francisco, for appellants.

Carter & Barrett and Carter, Barrett, Finley & Carlton, all of Redding, for respondents.

NOURSE, Justice pro tem.

This is an action to set aside as fraudulent a conveyance from defendant husband to defendant wife and to subject the property to plaintiffs' judgments. The trial court denied any relief to the plaintiffs and awarded to the defendant W. H. Curtis judgment in the sum of $6,400 on the fourth cause of action pleaded in his cross-complaint. The plaintiffs having appealed from the entire judgment.

In February, 1923, Reuben Kern leased to A. G. Steelman property in San Francisco to be used for a garage and Steelman executed a chattel mortgage to secure the covenants of the lease covering all the equipment and fixtures placed in the premises by the lessee or his assigns. Thereafter the plaintiffs purchased the property from Kern, and on November 30, 1926, leased the premises to defendant W. H. Curtis for a period of 10 years, at a total rent of $114,000, payable $950 per month. To secure performance of the lease Curtis acknowledged the existence of the chattel mortgage on the fixtures of the garage and also the payment to plaintiffs under paragraph XVII of the lease of the sum of $5,000, denominated a "bonus for the lessor's execution of this lease." The lease provided that, so long as there was no default by the lessee, the lessors would allow him semiannually a sum equal to interest at the rate of 6 per cent. per annum on the said $5,000, and that in the event of full performance the $5,000 would be credited on the rent for the last 5 odd months of the term.

On June 22, 1930, upon written consent of plaintiffs, the lease was assigned by Curtis to Steelman and Pike, Curtis expressly agreeing to remain liable on the covenants thereof. On February 25, 1931, with plaintiffs' written consent, the lease was assigned by Steelman to Pike, the assignor expressly agreeing to remain liable on all covenants. For the months of April, May, and June, 1931, neither Curtis, Steelman, nor Pike made any rental payment.

On November 12, 1930, Curtis secured, as lessee, a 15-year lease on two lots in Redding, Shasta county, which property he improved and operated as the "A-1 Motor Court." On June 16, 1931, Curtis conveyed to Clara E. Curtis, his wife and codefendant herein, all his interest in the A-1 Motor Court, including the leasehold and improvements. It is this conveyance which plaintiffs, by this action, would set aside as in fraud of their rights as creditors.

One day after the conveyance was made, on June 17, 1931, plaintiffs served on Curtis, Pike, and Steelman, with respect to the San Francisco garage, the 3-day statutory notice to quit, and on June 22, 1931, plaintiffs gave written notice of termination of the lease. The next day, June 23, 1931, plaintiffs filed in the San Francisco superior court an action in unlawful detainer against W. H. Curtis, Pike, and Steelman, seeking restitution of the garage premises, rent for April, May, and June, and attorney's fees. Separate answers were filed by W. H. Curtis and the other two defendants, alleging special defenses, such as the existence of the chattel mortgage given to secure performance of the lease, an agreement of sale dated July 25, 1930, whereby W. H. Curtis transferred to his codefendants all his interests in the personal property located in the garage, and an agreement of plaintiffs to release W. H. Curtis of all liability under the lease in consideration for the transfer to plaintiffs of the unpaid balance due on this contract of July, 1930. Trial of the action resulted in a judgment for plaintiffs, which became final on January 5, 1932.

On June 29, 1932, plaintiffs commenced a second action against the same defendants, Curtis, Pike, and Steelman, for foreclosure of the chattel mortgage. Curtis defaulted, and on September 1, 1932, a decree of foreclosure was entered for plaintiffs as against all of the defendants, in the sum of $3,095.48, plus $250 attorney fees, interest, and costs. A foreclosure sale was had at which plaintiffs bought in the property for about $25, and on September 21, 1932, a deficiency judgment was filed in their favor and against defendants for $3,564.80, with interest. On March 29, 1933, Steelman was adjudicated a bankrupt, with estate of no value, and on February 9, 1934, a writ of execution against Pike was returned unsatisfied. On July 6, 1933, writ of execution against Curtis directed to the sheriff of Shasta county was likewise returned wholly unsatisfied.

On June 18, 1934, plaintiffs commenced this present action against Curtis and his wife to set aside his conveyance to her on June 16, 1931, of his interest in the A-1 Motor Court at Redding. The complaint, based on sections 3439, 3440, and 3442 of the Civil Code, alleged that the conveyance was unaccompanied by any real change of possession, made without filing of the statutory notice of transfer required by section 3440 of the Civil Code, and with intent to defraud creditors at a time when Curtis was financially impotent and knew that he had already been indebted to plaintiffs for 3 months and that the unlawful detainer suit was about to be instituted by plaintiffs, and that no relief could be secured from Pike and Steelman. The prayer of the complaint was that the transfer be declared fraudulent and void; that defendants be restrained by injunction from interfering with the property or its proceeds (in January, 1934, the Curtis' had sold a portion of their interest in the motor camp to the Shell Oil Company) except under direction of the court, and that plaintiffs' judgments be satisfied out of it, and for general relief.

To plaintiffs' complaint defendants Curtis and wife filed an answer setting up a number of affirmative defenses, an amended answer, amendments thereto, and W. H. Curtis filed a cross-complaint alleging four causes of action, the fourth cause being later amended to conform to proof. On the subject of fraud, defendants averred that the wife paid the husband, as consideration for the transfer, $5,480 from her separate assets which sum he used to pay creditors; also that the conveyance was accompanied by an immediate change of possession. Another separate defense was that for a valuable consideration plaintiffs had agreed with and promised defendant Curtis that they would not attempt to enforce against him the judgment obtained by them in the prior unlawful detainer action. The gravamen of the charge in the four causes of cross-complaint was that, at the time plaintiffs secured judgment in the prior action in unlawful detainer, they converted personal property of Curtis worth $5,000 and also held unforeclosed the chattel mortgage given to secure performance of the lease covering $5,000 worth of other property in the garage, which property they took possession of and converted to their own use, and yet, when they purported by the second action to foreclose the chattel mortgage and to sell the property at a purported foreclosure sale to themselves for $25.50, they allowed Curtis no credit on account of the indebtedness under the lease, or in satisfaction of the judgment obtained in the first action, notwithstanding the value of the property was sufficient to satisfy in full both said indebtedness and said judgment. Furthermore, the cross-complainant alleged (fourth cause of action as amended to conform to proof) that when on June 30, 1931, the lease was terminated by mutual consent with $2,825 due for unpaid rent thereunder, and Curtis permitted plaintiffs to have possession of said $5,000 worth of personal property, thus discharging the $2,825 obligation, Curtis thereupon became entitled to receive back from plaintiffs the $5,000 which he originally deposited with them upon execution of the lease.

The questions presented by appellants on the appeal are: (1) In a suit in unlawful detainer, and for rent, if the defendant has the defense that plaintiff for a valuable consideration promised not to attempt to enforce the money judgment he was about to obtain (which plea is a satisfaction of all the rent sued for), is he required to plead these facts then and there, prior to judgment, or else lose the benefit of such defense? (2) Does the evidence support the findings of the trial court that the $5,000 deposited by W. H. Curtis at the time he secured the lease was in fact a deposit of security for rent and not a pure bonus as designated in the lease? (2b) If so, have not the defendants lost the right to assert this claim in their cross-complaint through the failure of W. H. Curtis to so plead it in one or both of the prior actions, or is it not a matter adjudicated as put in issue indirectly, if not directly, in the prior actions? (3) Does the evidence support the findings of the trial court that the transfer from W. H. Curtis to Mrs. Curtis was not in fraud of the creditors of the former, and was not made while Curtis was insolvent or in contemplation of insolvency?

In the unlawful detainer action Curtis pleaded as a special defense that on June 13, 1931, the plaintiff L. A. Bacciocco entered into an agreement with Curtis whereby, in consideration of the release of Curtis of all liability under the lease, there was assigned to plaintiffs all the interest of Curtis in the sum of $3,400 due him under his agreement of sale with Pike and Steelman. This was a plea that none of the rent sued for was due from Curtis to plaintiffs. In the latter agreement, dated July 25, 1930, Curtis agreed to sell to Pike and Steelman "all the equipment and personal property now located on the premises" and all of the interest of Curtis in the sum of $5,000 held by the lessor "under the terms of said lease." Trial of the unlawful detainer action was commenced on July 1, 1931, with all parties present and represented by counsel. The court found that it was not true that the plaintiffs released Curtis from any liability or responsibility arising out of the lease as alleged in this separate answer. It also found that the sum of $2,825 in unpaid rentals was due from Curtis and his codefendants to the plaintiffs in that action. In the present case Curtis alleged that, by reason of an oral agreement made the day before the trial commenced in the unlawful detainer case, plaintiffs made the same promise to release him from liability, but for a different consideration—an agreement to transfer to plaintiffs title to a portion of the same personal property which, in his special defense in the unlawful detainer case, he had alleged was under contract of sale to Pike and Steelman. On July 2, 1931, during the course of the trial of the unlawful detainer case, counsel for Curtis stipulated in open court that they had no interest in the possession of the premises "except from our contract with Mr. Bacciocco." In the present case the trial court found that on June 30, 1931, Curtis was the owner and entitled to the possession of this personal property and that, on the same day, plaintiffs promised they would never attempt to collect or enforce *either* of the judgments against Curtis. (The only agreement pleaded in the answer setting up this defense was alleged only to have carried the promise of the plaintiffs that they would not require Curtis to pay or satisfy any judgment obtained in the unlawful detainer action.) The consideration for this agreement was found to be Curtis' transfer to the plaintiffs of the personal property in the garage. It should be noted here that this agreement was found to have been made after the alleged agreement of Curtis to transfer his interest in the sale contract with Pike and Steelman, before the stipulation in open court that he had no interest in the possession, and before the commencement of the trial in the unlawful detainer action in which he went into court freely and openly in the effort to prove the alleged contract of June 13, 1931, with no mention of the alleged contract of June 30, 1931. Manifestly, when he contended in open court on July 1st that he was entitled to possession of this personal property under his contract with Pike and Steelman, he could not have made a legal transfer to the plaintiffs on June 30th of the same property. And the stipulation of July 2d that he was no longer interested in the possession was made to support his defense that Pike and Steelman were in possession under his contract with them, his interest in which he asserted he had assigned to plaintiffs in consideration for the alleged release. The situation briefly then is this—the defendant had a legal defense to the former action of payment and satisfaction which he pleaded and the finding was adverse to him. In this collateral proceeding he alleges, in effect, that the former defense was incorrectly pleaded—that the release claimed was based upon a different consideration than that formerly pleaded.

[1-3] The plea now made is not a valid defense upon any theory. On the former

trial the defendant alleged an agreement to release him from all liability and responsibility under the lease. The trial court found that the allegation was not true. On the second trial he pleaded the same release, but on a different consideration. The release was the matter in issue—more so than the consideration—but in a broader sense the defendants' obligations and liability were in issue, and it was the matter of the release and of that liability to pay the accrued rent which was then adjudicated. The law does not countenance piece-meal litigation and to this end it has been declared that, "If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject matter of the two actions be different." Freeman on Judgments, fifth edition, § 672, page 1418. In Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 511, 258 P. 387, 390, this court said: "Appellants, however, apparently have a misconception of this rule. They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto." See 15 R.C.L. § 446, pp. 969, 970; Andrews v. Reidy, 7 Cal.(2d) 366, 60 P.(2d) 832. This doctrine was given further recognition in English v. English (Cal.Sup.) 70 P.(2d) 625, where it was said to be applicable to cases of this general type, but inapplicable to a case based upon a severable contract—hence that a default judgment ordering payment of a matured installment did not preclude the defense of fraud and duress in another suit upon a subsequent installment.

[4] The rule is statutory when the defense is in the nature of a counterclaim arising out of the same transaction. Section 439, Code Civ.Proc. The same rule should apply to a plea of satisfaction in an unlawful detainer action when a counterclaim or cross-complaint is not permitted. Both test the right of the plaintiff to recover on the cause of action pleaded and, if recovery is had, that judgment sweeps away every defense that should have been raised. In this limited extent is found the exception to the rule of Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann.Cas.1916D, 370, hereafter discussed. Here it should be noted that there is no allegation or proof that any act of the plaintiffs caused Curtis to forego any defense to either of the former actions or that he was induced by any promise of plaintiffs to contend less vigorously. The facts are that, after the alleged agreement, the trial was had with Curtis defending fully and freely. His pleadings in this action do not support any charge of fraud or estoppel. The contention now made seems to have been conceived many years after the agreement is alleged to have been made.

[5] In his first cause of cross-complaint filed herein on July 9, 1935, defendant Curtis alleged that during the year 1932 plaintiffs, without his consent, took possession of certain equipment located in the garage as "described in Exhibit 'E' annexed to the amendments to the answer," and in his amended fourth cause of cross-complaint, filed herein on March 25, 1936, he alleged that on June 30, 1931, he was indebted to plaintiffs in the sum of $2,825 as unpaid rent under the lease and that he then fully paid said obligation "by the transfer to said plaintiffs * * * of personal property * * * described in Exhibit 'E', annexed to the amendments to the answer." It is this last allegation that the trial court here found to be true. Under these circumstances it is futile for respondents to talk of fraud, extrinsic fraud, and estoppel. If Curtis secretly made the agreement on June 30, 1931, and sat by during the trial of the unlawful detainer action withholding that information from his counsel and from the court, and insisting upon a defense which was wholly inconsistent with such agreement, he is in no position now to say that the fraud and deception was the fault of his adversary.

[6] (2) The portion of the judgment awarding Curtis recovery on his fourth cause of cross-complaint is not supported by any competent evidence. When the lease was executed in November, 1926, there was on deposit in escrow the sum of $5,000 paid in by the former lessee which

was treated as a payment by Curtis in the transfer of the respective interests of the parties. In the lease to Curtis it was stipulated that "*as a bonus* for the lessor's execution of this lease, the lessee has paid him, *unconditionally* upon execution thereof the sum of five thousand dollars ($5-000.00)." The trial court herein found that this fund was not a bonus but a deposit as security for the performance of the covenants of the lease. The terms of the contract are clear and leave no room for judicial interpretation. The parties agreed that the sum was paid unconditionally as a bonus, or consideration, for the execution of the lease. If all the terms were fully met and performed, portions of the fund would be repaid to the lessee, but no obligation was assumed by the lessor to repay under any other circumstances. The case is fully covered by Curtis v. Arnold, 43 Cal.App. 97, 101, 102, 184 P. 510; Wood v. Hipwell, 107 Cal.App. 680, 682, 290 P. 1040; and A-1 Garage v. Lange Investment Co., 6 Cal.App.(2d) 593, 596, 44 P. (2d) 681. Respondents rely wholly upon Sullivan v. Johnson, 116 Cal.App. 591, 3 P.(2d) 72, a decision which was fully explained by the same court in the A-1 Garage Case.

[7] It is the accepted rule that where the terms of a contract are ambiguous the court may consider evidence of the construction made by the parties in order to determine their intention when that is inaptly expressed in the contract. It is equally well settled that when the contract is clear and unambiguous the courts will not substitute their interpretation when such course would establish a contract radically different from the one made.

[8] The positions of the respondents in this matter are inconsistent. They contended in the trial court, and it was so found, that under the terms of the lease it was agreed that if Curtis defaulted in any of the covenants the plaintiffs could deduct a sufficient amount from this fund to compensate them for any loss suffered. There is not a word in the lease which justifies this finding. In plain language the lease provides that refunds should be made only when there was no default. But if it were true, then, when the unlawful detainer action was tried, plaintiffs were paid the full amount of the rent sued for and this was a defense to the action which should have been pleaded. Arnold v. Krigbaum, 169 Cal. 143, 146, 146 P. 423, Ann.Cas.1916D, 370. Notice of default in payment of rent was given June 17, 1931. The answer of Curtis was filed June 26, 1931. There was no controversy as to the amount of rent due at that time. The failure to pay this rent was the only default claimed and was the sole ground upon which the unlawful detainer action was based. If Curtis was entitled to have the amount in default credited from the sum on deposit he was entitled to it at the time he filed his answer. In the Arnold Case, 169 Cal. 143, at page 146, 146 P. 423, 424, Ann.Cas.1916D, 370, the court said: "If, by reason of dealings between them prior to the alleged forfeiture, the rent was paid or discharged at that time, he may show that fact, and in that way questions of contractual relations may properly arise in such an action. But this is not to be allowed to extend to a right of set-off; it can only go to the question whether or not, when the notice to quit was given, the rent claimed therein was due; that is, the question whether or not, by some agreement, express or implied, between them, *the claims due to the tenant from the landlord were to be applied on the rent.*" (Italics added.)

In the unlawful detainer action the trial court found that the full amount of rent claimed was then due. Judgment was entered against all the defendants for the full sum. If Curtis was entitled to have the sum deducted from the fund held by the lessor, no money judgment could have been entered against any of the defendants. We are compelled to assume from the face of that judgment that all available defenses were heard and determined. Hence, for the reasons heretofore given in answer to the first question, the defendants are foreclosed in this proceeding from raising the question of the status of that fund.

[9, 10] All that has been said herein in reference to the failure to interpose these pleas in the unlawful detainer action applies with greater force to the failure to interpose them in the action to foreclose the chattel mortgage. It should be noted that the defendants did not plead that any act or promise of the plaintiffs induced Mr. Curtis to fail to tender any of his available defenses to that action. Since the plaintiffs there prayed for a deficiency judgment as well as foreclosure, the defenses now urged would have constituted valid counterclaims in that action, and, not having been pleaded at that time, they may not be set up in this action. Section 439,

Code Civ.Proc. Since fraud may not be presumed but must be pleaded and proved, there is no foundation for the argument now made by these respondents that any extrinsic fraud on the part of the plaintiffs prevented them from having their day in court in the foreclosure proceeding.

(3) The finding adverse to plaintiffs upon their cause of action was based primarily on the finding that defendants were not indebted to plaintiffs in any amount and that the transfer was not therefore in defraud of them as creditors of W. H. Curtis. Since the findings on the issue of indebtedness cannot be sustained, the cause must be remanded for a new trial upon issues properly prepared, and it would serve no purpose at this time to discuss the evidence covering the issue of the alleged fraudulent transfer.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; EDMONDS, J.; SEAWELL, J.

---

9 Cal.2d 701

MORRIS v. SOUTH SAN JOAQUIN IRR. DIST. et al.

S. F. 15198.

Supreme Court of California.

Oct. 11, 1937.

Mandamus 🔑5

Where proceedings were pending in superior court for approval of plan of debt adjustment of irrigation district, proceeding in mandamus to compel irrigation district and officers to make available for payment of past-due interest and principal on irrigation district bonds moneys in the custody of the treasurer of the district would be suspended until matter pending in superior court had been heard and determined, irrespective of statute requiring suspension of proceedings in such instances (St.1937, p. 95, § 5; Bankr. Act § 80, 48 Stat. 798, 11 U.S.C.A. § 303).

In Bank.

Petition by Mary E. Morris for writ of mandate directed to the South San Joaquin Irrigation District and others. On motion to postpone further consideration of matter until the proceeding in superior court has been duly heard and determined.

Proceeding suspended until matter pending in superior court has been heard and determined.

Clark, Nichols & Eltse, of Berkeley, for petitioner.

Peter tum Suden and Richard tum Suden, both of San Francisco, amici curiæ.

Nutter & Rutherford, Newton Rutherford, Philip Cavalero, Stephen Dietrich, and D. R. Jacobs, all of Stockton, for respondents.

W. Coburn Cook, of Turlock, for intervener George F. Covell.

A. L. Cowell, of Stockton, Hankins & Hankins, of San Francisco, Arvin B. Shaw, Jr., of Los Angeles, Joseph Haber, Jr., of San Francisco, Harry W. Horton, of El Centro, James R. McBride, of Yuba City, C. Ray Robinson, of Merced, Hugh K. Landrau and Stephen W. Downey and Downey, Brand & Seymour, all of Sacramento, amici curiæ for Irrigation Dist. Ass'n of California.

PER CURIAM.

This proceeding in mandamus was brought to compel the respondent and its officers to make available certain moneys in the custody of the treasurer of the district for the payment of past-due interest and principal coupons of bonds of the district owned by the petitioner. As a return to the alternative writ the respondents filed a verified answer setting forth the fact that there was then pending in the United States District Court a proceeding for the confirmation of a plan of adjustment of the outstanding bonded indebtedness of the district, pursuant to the provisions of section 80 of the National Bankruptcy Act, 48 Stat. 798 (11 U.S.C.A. § 303). Upon the showing then made it was ordered that the present proceedings be suspended until the matter in the federal court was terminated. Morris v. South San Joaquin Irr. Dist., 2 Cal.(2d) 492, 41 P.(2d) 537. Thereafter, on May 25, 1936, the Supreme Court of the United States declared section 80 of the National Bankruptcy Act unconstitutional. Ashton v. Cameron County Water Improvement District, 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309. On November 9, 1936, the United States District Court made an order dismissing for want of jurisdiction the irrigation district proceeding pending before it. The district appealed to the Circuit

Court of Appeals for the Ninth Circuit. The order of dismissal was affirmed by that court on April 5, 1937. South San Joaquin Irrigation Dist. v. Gillett, 89 F.(2d) 1018.

On December 30, 1936, the petitioner herein filed an amendment to her petition for the writ of mandamus and a supplemental petition setting forth the fact that the Supreme Court of the United States had declared section 80 of the National Bankruptcy Act unconstitutional; also that the District Court had dismissed the proceedings pending before it. Upon the amended pleading this court issued a second alternative writ returnable on January 8, 1937, at which time the proceeding was continued to April 6, 1937.

In March, 1937, the Legislature passed Assembly Bill No. 2786 entitled: "An act providing ways and means for liquidating, refinancing, and readjusting certain indebtedness of irrigation districts in default; for judicial proceedings to carry out such purpose; for the confirmation of plans for liquidation, refinancing and readjustment; authorizing the exercise of the police power and the power of eminent domain for the acquisition and cancellation of obligations of districts held by persons not accepting such plan; declaring an emergency and the urgency hereof and providing that this act shall take effect immediately." Chapter 24, p. 92, Stats. 1937. By section 1 of that act the law was declared to be an urgency measure, and it went into effect upon its approval by the governor on March 30, 1937. As indicated by the title, the act provides for proceedings by petition in the superior court to carry out a plan for liquidation, refinancing, and readjustment of the indebtedness of irrigation district, after such plan has been approved by the board of directors of the district and by the California District Securities Commission.

On April 5, 1937, the respondent irrigation district filed a petition in the superior court in and for the county of San Joaquin setting forth that a plan of debt adjustment had been adopted by the board of directors of the district; that such plan had been approved by the California District Securities Commission, all as provided in the act of March 30, 1937, and praying that the superior court, after due notice and hearing to all parties concerned, approve the plan and make its findings and judgment as in said act provided.

When the present matter came on for hearing on April 6, 1937, the respondent district filed its answer alleging the filing of the petition in the superior court as above indicated. By this answer the district also denied certain allegations of fact set forth in the amended and supplemental petition herein. Upon the hearing herein on April 6, last, the respondent district moved this court to postpone further consideration of the present matter until the proceeding in the superior court had been duly heard and determined. It was insisted in that behalf that the respondents' plea in abatement, regardless of the provisions of the statute, was and is sufficient to require the postponement of the present proceeding, and that for that reason alone this court should not proceed until after there has been a hearing and the ascertainment of the facts and a determination by the superior court, which hearing (it is now pointed out) is set for October 13, 1937.

It is further contended by respondents that under section 5 of the act of March 30, 1937 (St. 1937, p. 95), this court is bound to postpone its determination herein until after the proceeding pending in the superior court is terminated. That section provides: "The filing of such petition [in the superior court] shall operate automatically to enjoin and stay, pending final determination of the proceedings as herein set forth, the commencement or continuance of suits or proceedings against the district or any officer or board of directors thereof which would interfere with or prevent the carrying out of the plan, and shall also operate automatically to enjoin and stay the enforcement of any lien or the levy of assessments except in so far as is consistent with and in furtherance of such plan. The court in which said petition is filed shall have exclusive jurisdiction with respect to all suits, actions and proceedings against the district filing such petition or any board of directors or officer thereof on account of the indebtedness of such district proposed to be liquidated, refinanced or readjusted by such plan or to enforce any lien or the levy of any assessments for the payment of such indebtedness and all matters incidental and collateral thereto and it shall be deemed that said plan is temporarily in full force and effect. It is hereby found and declared that proceedings for or the issuance or enforcement of a writ of mandate or other action or proceeding to enforce any lien or to enforce the levy of assessments for the payment of such indebtedness other than as provided in such plan would, during pendency of said proceeding, result in disorder and confusion and destruction of joint, relative and correlative rights of creditors affected by said plan and injury of third persons."

The petitioner insists that the court should not deem itself governed by the foregoing statutory stay, for the reason, so it is claimed, that the statute is unconstitutional, and it is urged that this court explore the provisions of the act, declare it unconstitutional, and proceed herein notwithstanding.

But, independent of the statute, the record before us affords sufficient reasons for the postponement until after the superior court has heard and determined the cause pending before it. In such event the disputed questions of fact may there be resolved. The respondents urge with much force that this could not be done herein without a reference; that the superior court is the appropriate fact-finding tribunal in the matter; that the superior court has jurisdiction in the first instance to pass upon the validity of the act of March 30, 1937, and that no questions of public interest are disclosed which would warrant a contrary course. Section 5 of the act in terms requires a postponement. Whether its provisions constitute an unwarranted interference with the constitutional jurisdiction of this court in mandamus need not be now considered. In any event, the present proceeding should be suspended until after the matter pending in the superior court has been heard and determined. See Keyston v. Banta-Carbona Irrigation District (Cal. App.) 65 P.(2d) 371.

It is so ordered.

---

9 Cal.2d 781

FIRST NAT. BANK IN TURLOCK et al. v. SOUTH SAN JOAQUIN IRR. DIST. et al. (WEAVER et al., Interveners).

S. F. 15798.

Supreme Court of California.

Oct. 11, 1937.

Mandamus 🔑5

Where proceedings were pending in superior court for approval of plan of debt adjustment of irrigation district, proceeding in mandamus to compel irrigation district and its officers to make available for payment of past-due interest and principal on irrigation district bonds moneys in the hands of the irrigation district treasurer would be suspended until matter pending in superior court had been heard and determined.

In Bank.

Proceeding by the First National Bank in Turlock, a corporation, and others for writ of mandate directed to the South San Joaquin Irrigation District and others, wherein Roy E. Weaver and others intervened.

Proceeding suspended until petition of respondent district pending in superior court is heard and determined.

Gillett & Gillett and J. N. Gillett, Jr., all of Oakland, Hugh D. Newhouse, Russell P. Tyler, tum Suden & tum Suden, and Pillsbury, Madison & Sutro, all of San Francisco, and W. Coburn Cook, of Turlock, for petitioners.

W. Coburn Cook, of Turlock (Charles L. Childers, of Los Angeles, of counsel), for interveners.

Netter & Rutherford, Newton Rutherford, Philip Cavalero, and Stephen Dietrich, all of Stockton, for respondents.

Joseph Haber, Jr., of San Francisco, A. L. Cowell, of Stockton, Hankins & Hankins, of San Francisco, Arvin B. Shaw, Jr., of Los Angeles, Harry W. Horton, of El Centro, James R. McBride, of Yuba City, C. Ray Robinson, of Merced, Hugh K. Landrau, and Stephen W. Downey and Downey, Brand & Seymour, all of Sacramento, for Irrigation Dist. Assn. of California.

PER CURIAM.

The mandamus proceeding herein is the same, in all essential particulars, as that involved in the cause of Mary E. Morris v. South San Joaquin Irrigation District (Cal. Sup.) 72 P.(2d) 154, in which an order in abatement has been made this day. For the reasons stated in the opinion in that matter further proceedings herein should be suspended until the petition of the respondent district in the superior court has been heard and determined.

It is so ordered.

23 Cal.App.2d 32

PEOPLE v. KIMBALL.

Cr. 3007.

District Court of Appeal, Second District,
Division 2, California.
Oct. 4, 1937.

1. False pretenses 🔑49(1)

Evidence *held* sufficient to support conviction for grand theft by false pretenses under statute requiring the testimony of one witness and corroborating circumstances to support such conviction (Pen.Code, § 1110).

2. Criminal law 🔑752½

Refusal to consider accused's motion to dismiss prosecution for grand theft by false pretenses and issuing checks with intent to defraud at close of state's case was proper.

3. Witnesses 🔑387

Cross-examination of accused as to whether he stated he desired to waive preliminary hearing and that he intended to plead guilty to one or more of several counts charging him with issuing checks with intent to defraud and grand theft by false pretenses was proper since such statement would have been an admission of guilt conflicting with his testimony on direct examination.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Frank H. Kimball was convicted of issuing bank checks with intent to defraud and of grand theft, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from a judgment of conviction on five counts of an information and from an order denying defendant's motion for a new trial.

Count 1 charges the defendant with feloniously making and delivering to one C. F. Weston a check in the sum of $500 with intent to cheat and defraud said C. F. Weston, knowing at the time of such making and delivery that he had not sufficient funds in or credit with the bank to meet said check. Count 2 charges the defendant with the crime of grand theft in that he did take $300 of the personal property of said Weston. Counts 3, 4, and 5 contain additional charges of issuing checks without sufficient funds.

About a week after becoming acquainted with his neighbor Weston, the defendant came to the house of Weston and asked him how he would like to make $200 right quick. The defendant thereupon represented to Weston that he had paid $600 on a lease for an advertising site in the fifty-seven hundred block on Wilshire boulevard, but that he had to have $300 more or that he would lose the option on said site; that the defendant had an agreement with a firm in New York for the purchase of said site for $1400 and that he had done considerable business with them and that they always paid him with a cashier's check and sent it airmail; that in this instance he had sent the lease to New York and they had agreed to send in a check as soon as the contract was delivered; that "the deal is in the bag and all we have to do is to get the contract back from New York and the money will be here Saturday." Weston told the defendant that he could not give him the money that day but that he would give it to him the next day. The defendant returned the next day and assured Weston that, "I have already sent the contract back to the advertising people in New York and the check will be in the mail today. All we have to do is to wait until Saturday and the money will be here."

Mr. Weston had insisted, however, upon having a contract between them, so the defendant made out the contract and signed the same, and then they went together to the bank where Weston withdrew $300 and gave it to the defendant. But the money did not come from New York, and there was no such deal. The following Wednesday the defendant assured Weston that the money was in the bank, and at the request of Weston the defendant wrote a check for $500 and delivered it to Weston. Said check was presented for payment the next day, but payment was refused with a showing that there was no money in the bank to meet the check.

[1] The first contention of the defendant is that there was insufficient evidence to sustain a verdict of grand theft. We have reviewed the evidence, and, viewing it in the light most favorable to the prosecution, we are of the view that there is substantial evidence to sustain the conviction on all counts and that there is corroboration of

the charge of grand theft under section 1110 of the Penal Code.

[2] Defendant's second contention is that defendant's motion to dismiss at the close of the People's case should have been considered by the court and failure to do so constituted reversible error. The court's ruling was proper under People v. Clark, 61 Cal.App. 46, 214 P. 248, and People v. Fouts, 61 Cal.App. 242, 245, 214 P. 657.

[3] The defendant's final contention is that the court over objection of the defendant admitted improper cross-examination of defendant not amounting to a confession and not impeachment. The defendant was asked if at the preliminary hearing he and his counsel had not stated that it was the desire of the defendant to waive preliminary hearing and that it was his intention to plead guilty to one or more of the charges when the matter reached the superior court. If the defendant had made such statement, it would be an admission of guilt in conflict with his testimony on direct examination, and was proper cross-examination.

Judgment affirmed as to all counts; order denying the motion for new trial affirmed.

We concur: WOOD, J.; McCOMB, J.

---

22 Cal.App.2d 591

SNYDER v. DOROSH et al.

Civ. 11511.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1937.

1. Appeal and error 🔑876

A final order granting motion, if not void on its face nor appealed from, is not reviewable on appeal from subsequent order denying motion to vacate previous order.

2. Appeal and error 🔑876

The District Court of Appeal will not review alleged errors in final order not void on its face, granting defendant's motion to vacate judgment for plaintiff, on appeal from order denying plaintiff's motion to set aside original order (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by P. N. Snyder against Paul J. Dorosh and others. From an order denying plaintiff's motion to set aside an order vacating a judgment in his favor on named defendant's motion, plaintiff appeals.

Affirmed.

Albert A. Albeck, of Los Angeles, for appellant.

F. H. Whitfield, of Los Angeles, for respondent.

McCOMB, Justice.

From an order denying his motion to set aside an order of the superior court, vacating a judgment pursuant to the provisions of section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851, plaintiff appeals.

The essential facts are these:

January 23, 1936, judgment was entered in favor of plaintiff. Thereafter on *July 22, 1936,* defendant filed an application under section 473 of the Code of Civil Procedure to vacate the judgment theretofore entered, which motion was granted *August 4, 1936. April 20, 1937,* plaintiff made a motion to set aside the order of August 4, 1936. This motion was denied.

This is the sole question necessary for us to determine:

May alleged errors in an order of the trial court vacating a judgment pursuant to the provisions of section 473 of the Code of Civil Procedure, from which no appeal has been taken and which is final, be reviewed upon appeal from an order denying a motion to vacate the prior order?

[1] This question must be answered in the negative. It is the law that an order not void on its face granting a motion, from which no appeal has been taken and which is final, is not reviewable on appeal from a subsequent order denying a motion to vacate the previous order. Zschokke v. Lumley (Cal.App.) 70 P.(2d) 495.

[2] In the instant case the order of August 4, 1936, was not void on its face and had become final several months prior to the order of April 20, 1937, herein appealed from. Therefore, applying the rule of law set forth above, this court will not review alleged errors in the original order.

The order appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

23 Cal.App.2d 76

BUCHIGNONI et al. v. DE HAVEN.

Civ. 5810.

District Court of Appeal, Third District, California.

Oct. 5, 1937.

1. Automobiles 🔑244(6, 35)

Evidence *held* to show that motorist who struck pedestrian who was walking on left side of highway from the opposite direction was negligent either in driving at a speed of 40 to 45 miles an hour without proper control of automobile and while vision was obscured, or in failing to keep a proper lookout if he had a clear vision, or in driving while seat was so overcrowded by two other large men that motorist was unable to operate automobile properly.

2. Automobiles 🔑160(3)

Automobile driver has duty to see pedestrians walking on highway in front of his automobile when his view is unobstructed.

3. Automobiles 🔑218

Statute requiring pedestrians to walk on left side of highway did not require pedestrian who was struck by an automobile to walk completely off roadway since statute defines roadway as portion improved, designed, or ordinarily used for vehicular traffic (St.1935, pp. 98, 188, §§ 83, 564).

4. Automobiles 🔑218

A pedestrian who was killed by an automobile while walking on left side of highway, where statute prescribed, had the right to assume that automobile drivers would obey the law and keep a proper lookout to avoid hitting him (St.1935, p. 188, § 564).

5. Trial 🔑296(3)

In action for death of pedestrian who was struck by automobile, instruction concerning driver's duty to see pedestrian was not improper as leading jury to believe that driver was negligent in failing to see pedestrian regardless of circumstances, in view of instructions as to pedestrian's duty to keep to his left side of highway (St.1935, p. 188, § 564).

6. Trial 🔑296(3)

In action for death of pedestrian who was struck by an automobile, instruction that driver's right on highway was not superior to pedestrian's right was not improper as causing jury to believe that driver did not have right of way, regardless of pedestrian's conduct where other instructions specified pedestrian's lawful place on highway.

7. Trial 🔑260(1)

Refusal to give instructions was proper where jury had already been instructed as to principle in proffered instructions.

8. Trial 🔑252(1)

Refusal to give instructions was proper where proposed instructions assumed facts not in evidence.

9. Trial 🔑242

Refusal to give instructions was proper where proposed instructions appeared to be confusing and involved.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Teresa Buchignoni and others, by and through their guardian ad litem, Teresa Buchignoni, against H. W. De Haven for the death of Paul Buchignoni. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Honey & Mayall, of Stockton, for appellant.

Gumpert & Mazzera, of Stockton, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from a judgment in favor of plaintiffs for the death of Paul Buchignoni, a pedestrian, who met his death when struck by an automobile being driven by the defendant, De Haven, on the evening of February 14, 1936.

The accident happened on the main highway which runs in a general easterly and westerly direction between the cities of Tracy and Manteca in San Joaquin county. Here the highway was of concrete 20 feet in width with an additional macadam shoulder on each side approximately 2 feet wide.

On the evening of the accident De Haven was driving his Chevrolet sedan toward Manteca and had with him as his guests two other men, all three being seated in the front seat of the Chevrolet sedan. The highway was wet, it having rained during the day, but apparently at the time of the accident no rain was actually falling although it was testified there was considerable moisture on the windshield. The windshield wiper, however, was not in operation at that particular time.

There is some question as to whether or not those in the car saw the pedestrian before being struck; at one time they stated they saw no one until after the impact but at the trial they testified that just before striking Buchignoni and while going at a speed of approximately 40 or 45 miles an hour they suddenly saw the form of a man practically in front of the car, about 15 feet away and in the center of defendant's half of the pavement, walking in a westerly direction, Mr. De Haven traveling in an easterly direction. He testified that he immediately applied his brakes and swerved to the left but was unable to avoid striking the man. The car continued across the highway and finally overturned to the north of the pavement and on the dirt shoulder approximately 125 feet from the point of impact. The point of impact was established by the presence of broken glass from the right headlight and by flesh and pieces of cloth which were found approximately 120 feet back of where the body of the deceased lay after the accident, and which point of impact apparently was on the southwesterly edge of the roadway or just south of the traveled portion of the roadway and off the concrete pavement.

The physical facts as testified to by eyewitnesses who examined the roadway immediately after the accident and the next morning seem to bear out the implied finding of the jury that the pedestrian was not seen by the occupants of the car until after the impact. No skid marks were found at or near the point where the deceased was struck and apparently no effort was made to apply the brakes until after the driver realized that he had run into something. The presence of glass, cloth, blood, and flesh also seem to demonstrate the fact that the pedestrian was not upon the paved portion of the highway but was walking on the macadam on the proper side of the highway. The driver testified that there was no car appoaching to blind him and that he was able to see 100 to 200 feet ahead and his lights were burning on the upper beam.

[1] From these physical facts the jury had the right to conclude that deceased was walking close to his left-hand side of the traveled portion of the highway and that De Haven was guilty of negligence either due to obscured vision, regardless of which he continued at a high rate of speed and did not have his car under that degree of control which the law requires of a driver to protect other persons lawfully using the road, or if De Haven did have a clear vision of the road ahead he failed to keep the proper lookout, or that the automobile was so overcrowded with the presence of three large men who were occupying the front seat that the driver was unable to properly operate the car.

In regard to the overcrowding of the front seat of the automobile it was stipulated that the front cushion of the car was 42 inches wide and that the three men seated thereon weighed respectively 180, 180, and 215 pounds.

If the jury believed that the driver's vision was obscured and that he was driving 40 or 45 miles an hour when blinded by lights or by spray on the windshield, then it is clear that defendant was not operating his car with the ordinary care with which he was charged. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

[2, 3] On the other hand, if De Haven did have a clear vision he was not keeping the proper lookout and his automobile was overcrowded. Our courts have frequently held that it is the duty of a driver of an automobile when the view is unobstructed to see persons walking on the highway in front of the car. Nichols v. Nelson, 80 Cal.App. 590, 252 P. 739; Warner v. Bertholf, 40 Cal.App. 776, 181 P. 808. The jury have by their verdict found that the deceased was walking on his left-hand side of the highway as required by law. Vehicle Code 1935, § 564 (St.1935, p. 188). Deceased was not required by this section to walk completely off the roadway. The word "roadway" being defined in section 83 of the Vehicle Code as "that portion of a highway improved, designed or ordinarily used for vehicular traffic."

Appellant cites several cases in support of his contention that the judgment should be reversed but practically all the cases he cites are crossing cases which are not applicable to the facts in the present case.

In the case of Finkle v. Tait, 55 Cal.App. 425, 203 P. 1031, a pedestrian was there crossing the street and the court held that the pedestrian, in the exercise of ordinary care, could and should have seen the lights of the approaching car and avoided it. He was carrying a box of raisins upon his shoulder in such a position that his vision may have been obscured.

[4] In the present case the deceased was walking where the law required him to walk, he had the right to assume that other persons using the highway would obey the law, keep a proper lookout to avoid hitting him; he was not required at his peril to dodge automobiles when he was obeying the law. White v. Davis, 103 Cal.App. 531, 284 P. 1086; McVea v. Nickols, 105 Cal.App. 28, 286 P. 761.

The case of Eveleth v. Goodchap, 5 Cal.App.(2d) 735, 43 P.(2d) 376, involved a pedestrian crossing a bridge. There the plaintiff stepped in front of the automobile. It was the duty of the pedestrian to look in the direction in which the danger might be anticipated, and his failure to do so constituted contributory negligence.

Likewise in the case of Nakamoto v. Testino, 2 Cal.App.(2d) 266, 37 P.(2d) 864. There the pedestrian was crossing the street without looking in either direction but looking at the ground.

Wagy v. Brave, 133 Cal.App. 413, 24 P.(2d) 209, was also a case of a pedestrian crossing the street at night and he was held guilty of contributory negligence because of his failure to keep a proper lookout.

[5] Appellant also claims that the court committed prejudicial error in certain of its instructions to the jury. At the request of plaintiff the trial court instructed the jury to the effect that it was the duty of the defendant, De Haven, as he approached the point on the highway where the deceased was walking, not only to keep a vigilant lookout ahead, but also to actually see and observe the deceased if he was walking along said highway in front of and in full view of defendant, De Haven, and if the defendant, De Haven, under such circumstances, failed to exercise ordinary care to see and observe the deceased before striking him, De Haven was guilty of negligence. Appellant cites, in support of his criticism of this instruction, Prato v. Snyder, 12 Cal.App.(2d) 88, 55 P.(2d) 255. In effect, however, this instruction merely states the general rule that one must see that which is visible, and when we examine the numerous instructions given by the court along the same line we find that the court instructed the jury that De Haven had a right to assume that other persons, including the deceased, would obey the law and that he had a right to assume that if the deceased intended to use the highway he would use that portion thereof which the law required pedestrians to use, and would not walk any place on the highway other than next to the left-hand edge of the highway. And further, that, if the deceased was walking along the highway at a place other than close to the left-hand edge of the highway, the said deceased was guilty of negligence as a matter of law, and, if such negligence proximately contributed in the slightest degree to the accident, plaintiff could not recover.

The court also instructed the jury that it was the duty of De Haven to keep a vigilant lookout ahead for other persons lawfully using the highway and to anticipate the presence of such persons, and it was his duty under the law to keep his machine under control as would enable him, under the exercise of ordinary care, to avoid collision, provided that the deceased was using proper care and caution.

It seems clear, therefore, from the foregoing instructions that the jury could not have been led to believe by the criticized instruction that De Haven was chargeable with negligence if he failed to see deceased, no matter how the latter was using the highway. The instruction clearly stated that unless Buchignoni was walking close to his left-hand edge of the roadway, as the law requires, plaintiff could not recover.

[6] In another instruction the court told the jury that the legal right of the defendant, De Haven, to drive and operate his automobile upon a public highway was not in any sense superior to the right of the deceased to walk upon and along such highway. Appellant claims that this instruction told the jury that the defendant did not have the right of way at the time and place of the accident, regardless of the conduct of the deceased. The other instructions very clearly pointed out to the jury, however, that the deceased had no lawful place on the highway except close to his left-hand edge thereof.

We do not believe the court erred in either of these particulars as claimed by appellant.

[7-9] It is also claimed that the court erred in refusing to give certain instruc-

tions as requested by the defendant. From an examination of these proposed instructions we believe the court was correct in refusing to give the same, first, because in most instances the jury had already been instructed upon the principle contained in the proffered instructions, and that, in some instances, the proposed instructions assumed facts not in evidence, such as, for instance, that the deceased was crossing the highway, and, in other instances, that the proposed instructions appeared to be confusing and involved.

Without quoting these various instructions we need merely say that we have read the same, and find that refusal to give these instructions did not lead to a miscarriage of justice, and the court was entirely justified in its refusal.

It appears that the instructions given, fully and fairly defined the law as applicable to the facts before the jury, and that no error was committed by the court either in giving instructions as given or in refusing those offered by the defense.

For the foregoing reasons the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

---

23 Cal.App.2d 95

Ex parte STANRIDGE.

Cr. 1577.

District Court of Appeal, Third District, California.

Oct. 6, 1937.

Rehearing Denied Oct. 23, 1937.

1. Habeas corpus ⚷85(1)

Evidence that accused assumed to speak for dairyman as officers arrived at dairyman's farm for purpose of enforcing an ordinance which required inspection and vaccination of dairy cattle, stating that the officers would not be permitted to test the cows, that force by clubs or guns would be used if necessary, and evidence respecting his knowledge that persons resisted were public officers, was sufficient to warrant holding accused on charge of resisting an officer in discharge of his duties (Pen.Code, § 148).

2. Habeas corpus ⚷11

Habeas corpus will not lie to secure release of one who has voluntarily surrendered himself for purpose of procuring the writ.

3. Contempt ⚷10

Attorney who attempted to surrender his client for purpose of procuring a writ of habeas corpus was not in contempt where it could not be said that attorney actually knew client was not then in custody of sheriff, although subterfuge employed was not commended.

◆

Proceeding in the matter of the application of William A. Stanridge for a writ of habeas corpus.

Writ denied.

George R. Andersen, of San Francisco, for petitioner.

Leslie A. Cleary, Dist. Atty., and J. Lee Robertson, Deputy Dist. Atty., both of Modesto, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of a writ of habeas corpus the petitioner seeks to be released from custody on the ground that the committing magistrate exceeded his jurisdiction in holding him for trial in the superior court after a preliminary examination upon a charge of resisting a public officer in the discharge of his duties contrary to the provisions of section 148 of the Penal Code. It is contended the preliminary examination discloses no evidence that the petitioner was aware of the fact that the persons were public officers who were threatened with bodily injuries if they attempted to enforce an ordinance of Stanislaus county which requires the vaccination of dairy cattle.

There is also a motion which was presented at the same time to adjudge the attorney for the petitioner guilty of contempt for presenting and procuring the preliminary order for the writ of habeas corpus without disclosing the fact that the petitioner was not then in actual custody.

There is no merit in the petition for a writ of habeas corpus. The evidence which was adduced at the preliminary hearing adequately discloses probable cause to believe that the accused person is guilty of resisting a public officer in the discharge of his duties by threatening him with violence and bodily harm if he attempted to enforce the Stanislaus ordinance to vaccinate the dairy cattle of one John Borba, and that the accused person then knew the threatened person was a public peace officer.

Stanislaus county adopted an ordinance requiring the testing and vaccination of dairy cattle within that county. That ordinance has been declared valid. Stanislaus County Dairymen's Protective Association v. The County of Stanislaus (Cal.Sup.) 65 P.(2d) 1305. John Borba owns a herd of dairy cattle which was kept on a ranch near Crows Landing in Stanislaus county. He opposed the inspection and vaccination of his cattle by the officers. On May 3, 1937, S. R. Briggs, a deputy sheriff of Stanislaus county, and five other deputies, accompanied the veterinarians to the ranch of Mr. Borba with the object of testing his cattle pursuant to the ordinance. When they arrived they found some 300 persons assembled on the ranch. Among them was this petitioner, who did not reside in Stanislaus county, but came from Hilmar in Merced county. He stood by the side of Mr. Borba and assumed to speak for him. There is substantial evidence that he heard the conversation of the officer with Borba, and must have known he was an officer who was then attempting to discharge his duties as a deputy sheriff. Regarding that subject the transcript of the preliminary examination consisting of 160 pages discloses the following evidence given by Mr. Briggs: "I * * * told Mr. Borba who we were, what we were there for. * * * He (the petitioner) was standing alongside of Mr. Borba, and right in front of Deputy Sheriff Lockridge and myself. * * * Mr. Stanridge said, 'I will talk for him, my voice is his voice.' * * * We are on a strike here, we don't belong to this—not allied to or don't belong to this damn fascist outfit, the Associated Farmers; * * * We refuse to let you test the cows. We will use any force that is necessary. If you use clubs, we will use clubs, and if you use guns we will use guns. * * * Mr. Borba was directly in front of me and Mr. Stanridge was on Mr. Borba's right, * * * about a foot and a half, two feet, if we were that far apart."

Mr. Borba testified regarding their knowledge of the fact that the persons to whom they were talking were public officers who had come to the ranch to test the cows, as follows:

"Q. Do you know the Deputy Sheriff, Stanton Briggs? A. Yes. * * *

"Q. You know Mr. Lockridge? A. Yes. * * *

"Q. And did the officers talk to you? A. Yes. * * *

"Q. Do you know the defendant, Mr. Stanridge? * * * A. Oh, well, yes, I see him there, too, yes.

"Q. Was he with you when the officers walked up to you? A. Yes. * * * I know them well, I know they were officers. * * *

"Q. You know they are Deputy Sheriffs, don't you? A. Yes."

On account of the threats and to avoid an open conflict, the officers left without testing the cows.

[1] The evidence amply warranted the magistrate in holding the accused person for trial on the charge of resisting an officer in the discharge of his duties. The magistrate did not exceed his jurisdiction in making that order. The petition for a writ of habeas corpus is therefore without merit.

[2] The return of the sheriff to the application for a writ of habeas corpus clearly indicates that the petitioner was not in his custody at the time the petition was presented to this court. He had been released on his own recognizance. It appears that the attorney for the petitioner attempted to surrender him to the custody of the sheriff for the purpose of making the application for the writ. One who has voluntarily surrendered himself for the purpose of procuring a writ of habeas corpus is not entitled to the writ. It is said in that regard in 29 Corpus Juris 23, § 15: "If the restraint is voluntary, as a general rule the writ ought not to issue, because unnecessary. So if a prisoner who has been released on bail surrenders himself of his own accord, it is held that habeas corpus will not lie." Ex parte Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A.(N.S.) 882, Ann.Cas.1912D, 1267; In re Bocci, 84 Cal.App. 269, 257 P. 888.

[3] It seems clear that the attorney for the petitioner did attempt to surrender his client for the purpose of procuring the writ of habeas corpus. That practice is not commended. It is a mere subterfuge

of procedure. We are, however, unable to say that the attorney did not actually know his client was not then in the custody of the sheriff. While we do not approve of the methods resorted to in this case to procure a writ of habeas corpus, we are of the opinion the motion to adjudge the attorney guilty of contempt on that account should be denied. It is so ordered.

The writ is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

---

23 Cal.App.2d 25

KUHN v. VALLEY MEAT CO.

Civ. 5833.

District Court of Appeal, Third District, California.

Oct. 1, 1937.

1. Appeal and error ⇨1071(6)

On appeal from judgment granting seller of lambs damages for buyer's breach of sales contract, trial court's failure to find whether there was usage entitling buyer to decide when lambs were in proper condition for delivery was immaterial, in absence of showing that lambs were actually in proper condition to be delivered as described by contract.

2. Sales ⇨69

A contract for sale of "90% of 8,000 lambs" to meat company, by raiser and broker of sheep, which provided that "seller hereby warrants and represents that said livestock are free from all incumbrances," referred specifically to lambs in existence and owned by seller at time of contract, and hence seller was not bound to deliver to buyer other fat lambs that might come into his possession.

3. Evidence ⇨441(9)

In action on written sales contract, oral testimony concerning oral agreements was inadmissible under statute (Civ.Code, § 1625).

4. Sales ⇨81(6)

Under contract for sale of lambs, which provided only that delivery should be between March 1st and June 1st, time for delivery of lambs was as lambs matured and became fat enough to be called merchantable, and in that condition wherein lambs are customarily delivered to market (Civ. Code, § 1657).

5. Sales ⇨69

Where broker and raiser of lambs contracted to sell lambs then owned and possessed by him, buyer was not entitled to lambs purchased by seller after execution of contract, and could not refuse delivery of other lambs because of seller's having resold such subsequently purchased lambs.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Alfred Kuhn against the Valley Meat Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ray Manwell, Ivan C. Sperbeck, and Charles A. Wetmore, Jr., all of Marysville, for appellant.

Erling S. Norby, of Marysville, and Ware & Ware, of Chico, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendant for the sum of $1,976.35, on account of three causes of action set forth in his complaint. From this judgment the defendant appeals.

On the first cause of action the plaintiff had judgment for the sum of $794.85, and interest thereon at the rate of 7 per cent. per annum from May 22, 1934, balance due for and on account of certain lambs sold and delivered to the defendant by the plaintiff. Upon the second cause of action the plaintiff had judgment against the defendant for the sum of $1,000, as and for damages sustained by him by reason of the refusal of the defendant to comply with the contract hereinafter set forth. Upon the third cause of action the plaintiff had judgment against the defendant for the sum of $43.44, costs of trucking, etc.

The plaintiff in the action is the owner and raiser of sheep, and is also engaged in the business of buying and selling sheep, and is especially engaged in furnishing lambs for the market. The defendant is a butcher at Marysville, Cal., and is engaged in the buying of lambs for the market as well as butchering of lambs.

On or about the 3d day of February, 1934, the plaintiff and defendant entered into the following contract:

"This contract made on Feb. 3, 1934, between Alfred Kuhn of Chico, seller, and Valley Meat Co. of Marysville, California, buyer; Witnesseth: That, for and in consideration of the sum of ($2000.00) dollars on signing of this contract, to be made as follows: 2000.00 to be paid on Mar. 1st, 1934, on the execution and delivery of this contract, receipt whereof is hereby acknowledged, and the balance upon delivery and acceptance of the livestock hereinafter mentioned, said seller agrees to sell, convey and deliver to said buyer, or its assigns, and said buyer agrees to buy the following livestock: 90% of 8000 lambs more or less at 7½c per lb, delivery to be made between 1st day of Mar. and 1st day of June. Lambs to be stood in dry corral 12 hrs. before working. We are to deduct 50c per on lambs as received.

"Delivery of said livestock shall be f. o. b. cars at nearest shipping point. All said livestock shall be in good, healthy and merchantable condition and shall be free from all diseases, and shall pass both Federal and State brand and health inspection at the time of delivery of the same.

"Said seller hereby warrants and represents that said livestock are free from all incumbrances, liens, or adverse claims, except those herein specified. This contract is subject to all Federal and State embargoes, quarantines and regulations affecting the movement of transportation of livestock and in the event that the movement or transportation of livestock is prohibited or impaired by reason of an embargo or a quarantine in effect at the time of the execution of this contract, or promulgated before the delivery of said livestock on board cars, said buyer may, at its option, terminate this contract and the amount of money paid by said buyer to said seller and all amounts of money paid by said buyer for maintenance of said livestock, while the same may be detained by reason of such embargoes, quarantines and regulations, shall be repaid to said buyer on demand.

"All the terms of this contract are herein set forth, and no change in, or addition to the terms or provisions hereof shall hereafter be made, unless approved in writing by said seller or said buyer.

"In witness whereof said seller and said buyer have executed this contract, the day and year first above written.

"Valley Meat Co.
"By J. W. Johnson, Buyer
"Alfred Kuhn, Seller."

This contract is silent as to any deliveries of the lambs mentioned therein, save and except that the deliveries are to be made between the dates of March 1st and June 1st. The record, however, discloses that what is called the "matured" lambs occurs at different intervals, and that during the interval of time mentioned in the contract certain portions of the lambs referred to therein would mature and be ready for the market prior to the 1st day of June, and also prior to many others of the lambs included in the purchase and sale; that it was the intent of the parties that the lambs should be delivered by the seller to the purchaser upon such dates and at such times as the lambs maturing first would be in a merchantable condition. We have not been pointed to any portion of the testimony describing merchantable lambs, but a reasonable inference would seem to be, lambs fat enough to be fit for the market.

Upon this appeal the chief contention made by the defendant is as to the failure of the court to find upon the issue as to whether the vendor or the vendee should, by usage, have the right to determine when any certain portion of the lambs involved in the sale were in a merchantable condition, fit for delivery, and when delivery should be made.

In the plaintiff's complaint there is an allegation that by usage the seller was to determine when the lambs were sufficiently fat to be merchantable and proper for delivery. On the part of the appellant no allegation is made in its pleadings as to usage and custom, the appellant's pleadings simply denying the allegations of the complaint as to usage and custom.

[1] Considerable testimony was introduced, and the court found against the allegations in the complaint, but did not find that there was any usage or custom entitling the appellant or purchaser to decide when deliveries should be made. The failure to find upon this usage, other than as stated, is set forth as grounds for reversal. However, from what is hereinafter stated it does not appear to us that the failure of the court to find further on the ground of usage and custom is material.

[2] It is further contended on the part of the appellant that as the plaintiff was a broker in the handling of sheep and was accustomed to buying and selling of lambs, and that if, at any time during the period mentioned, he became possessed of other fat lambs, it was his duty to deliver the same to the appellant. This contention, however, appears to us to be untenable.

The allegations of the appellant's cross-complaint, found to be true by the court, are directly opposed to the contentions in this particular, made by the appellant upon this appeal. The second paragraph of the appellant's cross-complaint reads: "Defendant is informed, believes, and therefore alleges that on the 3rd day of February, 1934, plaintiff was the owner of 8000 head of lambs; that on said date said plaintiff entered into an agreement in writing with this defendant, whereby plaintiff agreed to sell to this defendant 90% of the whole number of said lambs; that a copy of said agreement is attached to plaintiff's amended and supplemental complaint marked 'Exhibit A', and to said exhibit reference is hereby made for all purposes."

Partial payment for said lambs is further alleged. The agreement itself shows upon its face that it refers to lambs then owned and possessed by the plaintiff. In the second paragraph it refers to 90 per cent. of 8,000 lambs. Had the sale been for 8,000 lambs possessed by the plaintiff at any time during the period mentioned, there would have been no limitation of 90 per cent. In the fourth paragraph we find the following: "Said seller hereby warrants and represents that said livestock are free from all incumbrances, liens or adverse claims, except those herein specified." This is a specific reference to lambs then in existence and lambs owned and possessed by the plaintiff, and as to their being free from defects.

The record shows that at or about the time of the execution of the contract referred to herein, an agent of the appellant made an inspection of the different bands of sheep where the lambs were to be found; and also the testimony further shows that at the time of the execution of the contract the plaintiff was the owner and in possession of about 8,500 ewes, so that the reasonable interpretation of the contract, as well as the pleadings to which we have referred, is to the effect that the contract of sale and purchase referred to the lambs then owned by the plaintiff, which were to be delivered according to the conditions therein stated to the extent of 90 per cent. thereof (more or less). Of the lambs referred to the record shows that the plaintiff delivered to and the defendant received 3,045 out of an entire number of 7168. Of the lambs which the appellant refused to receive, it appears that the plaintiff sold to other parties 1,807 and retained in his possession 2,316. The price received by the plaintiff for the 1,807 lambs sold by him to other parties than the appellant after the alleged breach of the contract by the appellant, and also the value of the lambs retained by the plaintiff, were calculated and considered by the court, and the damages suffered by the plaintiff by reason of the breach of the contract on the part of the appellant, as found by the court, was the sum of $1,000.

The appellant, in support of its contention that the court erred in not finding that the usage and custom pertaining to the buying and selling of lambs under contract such as was executed between the parties hereto, sets forth that the appellant at different times demanded deliveries of lambs, and that the plaintiff refused to deliver the same on the grounds that they were taking on flesh rapidly, and that he was entitled to determine when delivery should be made.

There is no testimony in the record, or at least none has been called to our attention, which would indicate or lead to the conclusion that any number of lambs were fat enough to be called merchantable, and therefore in a condition to be delivered according to the intent and terms of the contract at such times. Thus, no matter what the usage might be, unless there was a showing that there were lambs, merchantable, as we have described, the failure of the court to find on the issue of custom, would be wholly immaterial.

[3] As to the oral agreements alleged in both the answer and cross-complaint, the finding of the court is against the same, and of course such oral testimony came within the prohibition of section 1625 of the Civil Code.

[4] As to when the lambs were to be delivered, we think this case comes within the holding of the court in the case of Hougland v. Roth Blum Packing Co., 99 Cal.App. 631, 279 P. 159, where the subject of the delivery of sheep and the time for delivery was considered extensively, and the court held, where time is unmentioned for the execution of the contract, it meant a reasonable time, taking into consideration all the

conditions surrounding the subject of the contract. Applying that rule to the case at hand, it would appear, following section 1657 of the Civil Code, that the intent of the contract in this case was and is that deliveries of lambs should be made as they matured and became fat enough to be called merchantable, and in that condition when lambs are delivered to the market for the purpose of being slaughtered and placed on sale through the usual courses of handling such merchandise.

[5] It is undisputed that the appellants refused to take final deliveries of the lambs mentioned in the contract, the contention being that the plaintiff had been selling what are called "tops," meaning fat lambs purchased by him after the execution of the contract referred to herein, and the contention being further made that the appellant was entitled to such "tops" or fat lambs under and by virtue of its contract with the plaintiff, as well as fat lambs from bands owned by the plaintiff at the time of the execution of the contract.

From what we have said, this contention of course was properly held untenable by the court, and did not constitute a valid reason for refusing to accept final delivery.

Finding no reasons, in any of the contentions made by appellant, for reversal, it follows that the judgment must be, and the same is hereby, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

---

22 Cal.App.2d 657

PEOPLE v. OCEAN SHORE R. R., Inc., et al.

SAME v. HENSHAW.

Civ. 10428.

District Court of Appeal, First District, Division 2, California.
Sept. 27, 1937.

1. Appeal and error 🔑845(1)

Where defendant was not prejudiced, trial court's rendering of separate findings, conclusions, and judgments in each of two consolidated condemnation actions was not error, and for purposes of appeal the two sets of findings, conclusions, and judgments could be considered as one.

2. Eminent domain 🔑240, 262(5)

In condemnation proceedings, where property owner raised issue of resulting damages by his pleadings, and supported the pleadings by competent evidence, failure to make specific finding upon such issue was reversible error (Code Civ.Proc. § 1248, subd. 2).

3. Eminent domain 🔑240

In condemnation proceedings, court's conclusion of law that payment of sums specified was in full payment for lands taken as right of way, together with all damages of every kind suffered by property holder, did not justify conclusion that trial court had thereby inferentially found adversely to property holder with respect to issue of damages to adjacent property so as to preclude necessity for a specific finding (Code Civ.Proc. § 1248, subd. 2).

4. Trial 🔑404(2)

A finding may be treated as one of fact, although mistakenly placed among conclusions of law, and, in some cases, inferences may be drawn which must necessarily follow from findings expressly made.

5. Trial 🔑404(4)

Former doctrine of implied findings has no place in legal system of California since adoption of Code which expressly requires that facts found be stated (Code Civ.Proc. § 632, as amended by St.1933, p. 1876).

6. Trial 🔑388(1)

The right to findings is a susbtantial right, as inviolate under statute as that of trial by jury under the Constitution (Code Civ.Proc. § 632, as amended by St.1933, p. 1876).

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Condemnation proceedings by the People of the State of California, acting by and through the Department of Public Works, against the Ocean Shore Railroad, Inc., and others, including Griffith Henshaw, individually and as trustee, and against Griffith Henshaw, individually and as trustee. Judgments for plaintiff in both actions, and Griffith Henshaw appeals from both judgments.

Reversed, and new trial ordered.

Keyes & Erskine and Eric Lyders, all of San Francisco, for appellant.

Clarence W. Morris, Lincoln V. Johnson, and George C. Hadley, all of San Francisco, for the People.

OGDEN, Justice pro tem.

This is an appeal from judgments of condemnation rendered by the court, sitting without a jury, in two actions consolidated for trial brought by respondent to acquire for highway purposes a strip of land running along the ocean coast in the county of San Mateo.

Appellant, as an individual and as trustee for others, was the owner of two of the parcels involved in the first of the actions brought and also owns the property adjacent thereto on both sides. In this action respondent took immediate possession of the property and started construction of the highway. Thereafter, a slide occurred on certain of the adjacent lands of appellant and thereupon respondent commenced the other of the consolidated actions in which this slide area was sought to be acquired. By stipulation, the actions were tried only as to the parcels of land owned by appellant.

[1] Appellant urges as error the action of the trial court in making and rendering separate findings, conclusions, and judgments in each of the consolidated actions. Although, by authority of Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001, and Staub v. Muller, 7 Cal.(2d) 221, 60 P.(2d) 283, the trial court might well have determined the two actions with but a single set of findings and conclusions, and a single judgment, its failure to do so resulted in no prejudice to appellant. For the purposes of this appeal, the two sets of findings, conclusions, and judgments may be considered in reality as but one. Stanton v. Superior Court, supra.

[2] A meritorious objection to the trial court's findings is, however, based upon their failure to include any determination of the issue of damage to the adjacent property of appellant by reason of the construction of the proposed improvement. In each case, upon the issue of damage, the trial court found only as to the value of the parcels of land taken, and awarded compensation in those sums. No express finding was made as to the presence or absence of damage to the remaining and adjacent property of appellant.

All of the parcels of property of appellant condemned were but a part of a larger parcel owned by him. That damages would result to his remaining land as a result of the construction of the highway was alleged in his answers in both actions and was the subject of testimony by expert witnesses called by both parties. Appellant's witnesses testified that the grading of the highway would cause future slides upon the adjacent lands of appellant, such as had previously occurred in the area involved in the second action, and respondent's engineers testified that the likelihood of their occurrence was extremely remote and speculative. The evidence offered by appellant as to such resulting damage was, if accepted by the trial court, sufficient to have sustained a finding thereon favorable to him and an award of compensation therefor.

Subdivision 2 of section 1248 of the Code of Civil Procedure expressly provides that in proceedings in eminent domain the court must, if the property sought to be condemned constitutes only a part of a larger parcel, ascertain and assess the damages which will accrue to the portion not sought to be condemned by reason of the construction of the improvement in the manner proposed by the plaintiff. Appellant, having raised the issue of resulting damages by his pleadings and supported it by competent evidence, was therefore clearly entitled to a specific finding upon this material issue and a failure to find thereon must be held to be reversible error. Davis v. Monte, 81 Cal. App. 164, 253 P. 352; Williams v. Wren, 88 Cal.App. 607, 263 P. 1038.

[3-6] Respondent does not dispute the right of appellant to a finding upon this issue, but contends that the trial court inferentially found thereon adversely to appellant. It asks us to so infer from the provision contained in the trial court's conclusion of law, "That the payment into court of said sums of money as hereinabove specified (referring to the sums of money found to represent the value of the land taken) is in full payment for the lands so taken as a right of way, together with all damages of every kind and nature suffered by defendants by reason of the taking of said lands and the construction of said highway."

We cannot agree with respondent that the trial court's conclusion, that an amount equal to the value of the land taken should constitute the total award and fully compensate for damages of every kind suffered, can be said to amount to a finding of fact that no damage except the value of the land taken was suffered by appellant. Although it is true that a finding may be treated as one of fact, although mistakenly placed among the conclusions of law (Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555) and in some cases inferences which must necessarily follow from findings expressly made may be resorted to (Warden v. Stoll, 210 Cal. 374, 291 P. 835), these rules have no application here. To so hold would be to permit the finding by implication of all facts necessary to support the legal conclusions of the trial court. The former doctrine of implied findings has held no place in our legal system since the adoption of our Codes. North Pacific R. Co. v. Reynolds, 50 Cal. 90; Dowd v. Clarke, 51 Cal. 262. Section 632 of the Code of Civil Procedure (as amended by St.1933, p. 1876), expressly requires that the facts found be stated. As stated in Frascona v. Los Angeles Ry. Corp., 48 Cal.App. 135, 191 P. 968, 969, "The right to findings is a substantial right, as inviolate, under the statute, as that of trial by jury under the constitution."

The judgments rendered in each of the consolidated actions are therefore reversed, and a new trial ordered.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

---

23 Cal.App.2d 743

Ex parte GALIK.

Cr. 1993.

District Court of Appeal, First District,
Division 1, California.
Oct. 7, 1937.

Public service commissions 🔑6

An application for writ of habeas corpus to procure release from custody under commitment for violating Railroad Commission's order must be denied.

Application by Joe Galik for a writ of habeas corpus.

Application denied.

Joseph M. Trusty, of San Francisco, for petitioner.

PER CURIAM.

Application in habeas corpus to procure the release from custody under a commitment for violation of an order of the Railroad Commission. The application is denied on the authority of In re Victor, 220 Cal. 729, 32 P.(2d) 608.

---

23 Cal.App.2d 71

NELSON v. ANGELUS HOSPITAL ASS'N OF LOS ANGELES et al.

Civ. 11344.

District Court of Appeal, Second District,
Division 1, California.
Oct. 5, 1937.

1. New trial 🔑163(1)

Order vacating judgment on defendants' motion for new trial was not a nullity on ground that court exceeded jurisdiction for failure to include direction for new trial, where court had jurisdiction of parties, of cause, and of motion, since court was authorized to make order whether it was correct or incorrect.

2. New trial 🔑71, 72

On consideration of motion for new trial on ground of insufficiency of evidence to justify verdict, trial court is not particularly concerned with fact that evidence is conflicting or that apparent weight of evidence is in support of verdict, since court has duty to consider evidence and reach just conclusion thereon if he be satisfied that verdict is not in fact supported by evidence.

3. Appeal and error 🔑1005(2), 1015(1)

On appeal from order granting or denying new trial on ground of insufficiency of evidence to justify verdict, all that is required to sustain order is that record disclose substantial evidence in support of conclusion reached by trial court.

4. Appeal and error 🔑1005(3), 1015(2)

Where evidence of plaintiff and defendants was not only directly in conflict, but evidence of defendants preponderated, Court of Appeal would affirm order of trial court granting certain defendants new trial and denying plaintiff a new trial against certain other defendants.

◆

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Ella Nelson against the Angelus Hospital Association of Los Angeles and others. From a judgment and order granting certain defendants a new trial and denying plaintiff a new trial as to certain other defendants, the plaintiff appeals.

Judgment and order affirmed.

Holbrook, Taylor, Tarr & Reed, of Los Angeles, for appellant.

Walter S. Coen, of Los Angeles, for respondents.

PER CURIAM.

Plaintiff herein brought action against the several defendants, to recover a judgment for damages which were asserted to have been sustained by her because of the alleged negligence of the defendant hospital and the defendant clinic, in the omission by each of such institutions or agencies to timely perform certain acts or to render to plaintiff certain services that assertedly should have been performed by each of them respectively in behalf of plaintiff while she was a medical patient in said hospital. Damages were further asserted to have been sustained, as far as concerned each of the other defendants (who was either a doctor, a nurse, or a manager employed by, and who rendered services as such respective employee in, said hospital or clinic at and during said time), because of his alleged negligent act or conduct committed by him in connection with the care and treatment of plaintiff as such patient.

A verdict was rendered by the jury in favor of said plaintiff and against defendants R. B. Jenkins, Incorporated, R. B. Jenkins, and A. M. Dodd, and against plaintiff, and in favor of defendants George Nador and H. Grace Franklin.

In pursuance of a motion which was made by defendants R. B. Jenkins, Incorporated, R. B. Jenkins, and A. M. Dodd, to the effect that as to them the trial court order that said judgment be vacated and that they be granted a new trial, the trial court made its order by which the verdict and the judgment entered thereon in favor of plaintiff and against said defendants were "set aside and vacated * * * on the grounds that: (a) the evidence is insufficient to justify the verdict, and said verdict and judgment is against the law. * * *" With reference to plaintiff's motion to the effect that the judgment that was rendered in favor of defendants Nador and Franklin be vacated and set aside, the trial court made its order "that the motion of plaintiff to vacate and set aside the verdict herein and the judgment entered thereon * * * in favor of defendants George Nador and H. Grace Franklin and against plaintiff, and for a new trial as to defendants Nador and Franklin only, be, and the same is hereby denied." It is from that order and judgment that the instant appeal is prosecuted.

[1] Appellant complains that, although by the terms of the order as to certain of the defendants the judgment was vacated, the order contained no direction that a new trial be had as to them, and that because of that fact the trial court exceeded its power or jurisdiction, with the result that the entire order was a nullity. But it is clear that such contention is untenable. Undoubtedly the trial court had jurisdiction of the parties, the cause, and of the particular motion that was presented to it. In such circumstances, the trial court was authorized to make its order, whether, from a legal standpoint, correct or incorrect; and even though the latter condition could be legally established, the conclusive effect would be that mere error had been committed. Judging from the pleadings in the action and the evidence that was adduced on its trial, the trial court might have been persuaded that, should a new trial be granted, in no event could the plaintiff succeed on a retrial of the action. In such an assumed situation, it might have been possible that as to certain defendants the trial court intentionally omitted to order that a new trial should be had. But that such was not the intention of the judge of the trial court is made obvious from a consideration of the fact that a later "nunc pro tunc" order was made by the trial court (which order, although not properly a part of the record herein, nevertheless admittedly was made), and which order included a direction that as to the affected defendants a new trial was granted to plaintiff. Besides, throughout respondents' brief, in effect, the fact is repeatedly conceded that, considering the language of the

motion, the failure of the trial court to expressly order that a new trial be had was a mere inadvertence on its part, and that at all times it was its intention to order (if that was legally necessary) that a new trial should be had as to such defendants. And since, in respect to appellant's objection, she is accorded everything which she asserts is her legal right in the premises, it becomes unnecessary to devote special consideration to any or either of the several legal aspects of the situation to which appellant has directed attention.

[2, 3] Although appellant has ably presented to this court for its determination each of several different legal questions, on consideration thereof it becomes manifest that all of them are merely incidental or subordinate to the ultimate question of whether the trial court abused its discretion in granting a new trial as to defendants R. B. Jenkins, Incorporated, R. B. Jenkins, and A. M. Dodd, and in refusing a new trial as to the remaining defendants in whose favor the jury had returned its verdict. In that regard, and particularly with reference to the authority of the superior court in the matter, the law is well established that, on consideration of a motion for new trial on the ground of insufficiency of the evidence to justify the verdict or decision, a trial court is not particularly concerned with the fact (if it so appear) that as to vital issues in the case the evidence was "conflicting." To the contrary, notwithstanding any such conflict, or even though the apparent weight of the evidence should be in support of the "verdict or decision," since it is the personal duty of the trial judge to weigh and to consider the evidence and to reach a just conclusion thereon, if he be satisfied that the verdict or decision in question is not in fact supported by the evidence, or that it is contrary to the weight of the evidence, he is not only authorized, but it is his bounden duty to grant the motion for new trial. 20 Cal.Jur. 117, 118, and authorities there cited. In such a situation, on appeal from the order, all that is required to sustain it is the fact that the record discloses substantial evidence in support of the conclusion that has been reached by the trial court in that respect.

[4] With such principles of law in mind, ordinarily it might be deemed advisable that the evidence, or at least a summary of it, be set forth in order that either an abuse of discretion on the part of the trial court should be made clearly to appear, or that a justification for the making of the order might be legally established. However, in the instant matter, for the reason that the pertinent evidence that related to the issue of the negligence of the hospital, the clinic, and that of each of the several individual defendants, is so voluminous that if such a course should be pursued this opinion would be unnecessarily or unjustifiably extended, it may suffice to state that, after a careful examination of the transcript of the evidence, it appears therefrom that on such issue, as it affected each of the several defendants, the evidence that was introduced by plaintiff was not only directly in conflict with that which was presented by defendants, but also that the evidence so introduced by the latter greatly preponderated over that which the plaintiff had presented. Moreover, judging simply by the "cold record," and particularly that part relating to the testimony that was given by the experts, which by far constituted the bulk of such evidence, the quality and the resultant credibility of the evidence that was introduced in behalf of the defendants apparently was markedly higher and better than that which was offered and received in behalf of plaintiff. Whether the trial court actually was in complete accord with such a view of the situation is unnecessary of consideration. On its review and consideration of the evidence that was adduced on the trial of the action, if the trial court relied upon the abundance of substantial evidence that appears in the record, in support of that which to this court appears to be a correct conclusion that on the facts the verdict that had been returned by the jury was neither correct nor just, the clear duty of the trial court was to grant the motion as to defendants R. B. Jenkins, Incorporated, R. B. Jenkins, and A. M. Dodd, and to deny it as to defendants George Nador and H. Grace Franklin. Although the motion that was granted contained many specified statutory grounds for the granting of a new trial as to defendants R. B. Jenkins, Incorporated, R. B. Jenkins, and A. M. Dodd, it is noted that in making the order in question the trial court expressly limited its ground therefor to that of insufficiency of the evidence to justify the verdict; and in itself that fact is indicative of the attitude of the trial court and the reason which actuated or impelled the making of the order.

With reference to judicial conduct in the premises, nothing in the record to which the attention of this court has been directed points to anything other than a clear understanding of the evidence on the part of the trial judge and his determination to make his ruling on the merits of the entire motion presented for his consideration in accord with the law applicable thereto.

The order and the judgment from which the appeal is taken herein are, and each of them is, affirmed.

---

23 Cal.App.2d 53

MORALES v. INGELS, Director of Department of Motor Vehicles.

Civ. 2114.

District Court of Appeal, Fourth District, California.

Oct. 4, 1937.

Appeal and error 🔑1161

Judgment annulling order of director of department of motor vehicles was reversed, with directions to sustain demurrer with permission to amend and that remittitur issue forthwith, where both parties filed a confession amounting to a stipulation to that effect.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Proceeding by Alex Morales, Jr., to review an order made by Ray Ingels, as Director of the Department of Motor Vehicles of the State of California. From a judgment annulling and setting aside the order, the respondent appeals.

Reversed, with directions.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellant.

Leo J. Friis, of Anaheim, for respondent.

BARNARD, Presiding Justice.

In a proceeding to review an order made by the respondent director of the Department of Motor Vehicles a judgment was entered annulling and setting aside said order, and this appeal followed.

The petitioner and respondent has filed herein a confession of error, joined in by the appellant, which in effect amounts to a stipulation that the judgment appealed from may be reversed, with directions to the trial court to sustain a demurrer to the petition with permission to amend, and that the remittitur may issue forthwith.

The judgment is reversed, with directions to the trial court to sustain the demurrer to the petition and to permit the petitioner to amend. It is further ordered that the remittitur issue forthwith.

We concur: MARKS, J.; JENNINGS,

---

22 Cal.App.2d 636

RIGGS v. GASSER MOTORS et al.

Civ. 5748.

District Court of Appeal, Third District, California.

Sept. 25, 1937.

1. Evidence 🔑5(2)

It is common knowledge that intersecting streets in cities present continuing hazard, degree of which depends on extent of use of such streets and surrounding circumstances or conditions at each intersection.

2. Automobiles 🔑168(6)

The statute providing that no person shall drive vehicle on highway at speed greater than is reasonable or prudent, having due regard for traffic on and surface and width of highway, and never at speed endangering safety of persons or property, always governs operation of automobiles at city street intersections (St.1935, p. 176, § 510).

3. Automobiles 🔑168(1)

The speed limits specified by statute under particular conditions are always subject to basic statutory rule prohibiting speed greater than is reasonable or prudent or endangering safety of persons or property, whether district is signposted or not (St. 1935, pp. 176, 177, §§ 510, 511).

4. Trial 🔑296(3)

An instruction that it is motor vehicle operator's duty to keep machine always under control, so as to avoid collisions with persons lawfully using highway, and that defendant automobile driver was negligent and liable for resulting loss to plaintiff, if such defendant did not keep automobile under such control, was not prejudicial to defendants, though deficient, in view of instructions, given at their request, as to operation of automobile in which plaintiff was riding at time of collision with former automobile (Const. art. 6, § 4½).

> The court instructed jury at defendants' request that it was duty of driver of automobile, in which plaintiff was riding, to keep it always under control, so as to avoid collision with other vehicles lawfully using highways, to be ever on alert and vigilant, to anticipate presence of other vehicles on highway, and to keep automobile under such control as to enable him, in exercise of reasonable and ordinary care, to avoid collision with another automobile being driven with proper care and to slow up and stop if person of ordinary care and prudence would do so to avoid collision.

5. Damages 🔑208(3)

It is jury's province to determine from testimony in personal injury suit whether plaintiff's injuries are such that future detriment is so reasonably certain to occur as to be considered in determining damages (Civ. Code, § 3283).

6. Trial 🔑241

The court did not err in reading to jury in personal injury suit the statute authorizing award of damages "for detriment resulting from the commencement thereof, or certain to result in the future," though no witness testified absolutely that future detriment was certain (Civ.Code, § 3283).

7. Appeal and error 🔑928(1)

The appellate court must assume in support of instruction as to what constitutes obstructed street intersection, which court and jury viewed with consent of parties' counsel, that conditions there presented warranted such instruction.

8. Appeal and error 🔑837(1)

In considering amount of damages awarded for injuries to plaintiff, appellate court may consider costs, not compensable as such, which plaintiff must incur.

9. Damages 🔑130(1)

A jury's verdict, awarding $20,000 damages to minor girl for fractured skull and injuries to shoulder, back of neck, brain, and nerves of one eye, causing it to turn up, *held* not excessive.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Dora Riggs, a minor, by her guardian ad litem, Ben Riggs, against the Gasser Motors and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb and Dennis M. Duffy, all of San Francisco, and A. R. Trower, of Napa, for appellants.

Mervin C. Lernhart, of Napa, and J. Horton Beeman, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiff had judgment against the defendants for the sum of $20,000, for and on account of injuries suffered by the plaintiff in an automobile collision occurring in the city of Napa, on or about the 5th day of February, 1936.

The record shows that the defendant Robert Merrill, an agent and employee of the other defendants, was driving an automobile easterly in the city of Napa, on a certain street called South street, and that the plaintiff was riding with one Ben Riggs in an automobile being driven southerly on Randolph street in the city of Napa. At the intersection of the two streets named the collision occurred, resulting in the injuries to the plaintiff hereinafter set forth.

Practically no contention is made that the defendant Robert Merrill was driving a Packard automobile other than in a careless and negligent manner. This is practically conceded in the appellants' brief where they state that a new trial would probably result in a verdict in favor of the plaintiff, and that the purpose of seeking a new trial is really to obtain, if possible, a verdict against the defendants in a lesser sum.

To sustain their contention that a new trial should be granted, the appellants urge, first, that the court erred in giving certain instructions, and, second, that the verdict is grossly excessive. We may admit that some of the instructions given by the trial court are not worded technically as they should have been, but, in view of certain instructions given at the request of the appellants, and under section 4½ of article 6 of the Constitution we must conclude that no injury has been suffered by the appellants for such reason.

[1, 2] Section 510 of the Vehicle Code (St.1935, p. 176) reads: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

Section 511 of the same Code then specifies certain lawful speeds under the conditions particularized. These, the court read to the jury, and also read section 513, supra.

It is common knowledge that intersecting streets in cities present a continuing hazard, the degree of hazard depending upon the extent of the use of the intersecting streets and the surrounding circumstances or conditions of each intersection. Under such circumstances the basic law as set forth in section 510, supra, is always governing.

In the case of Graybiel v. Auger, 64 Cal.App. 679, 222 P. 635, 639, the court said (referring to the basic rule then existing under a different numbered section, but which is now the section above numbered): "This provision of the section is just as much a portion of the law as that which allows a speed of 35 miles per hour under certain specified conditions."

In the case of Dam v. Bond, 80 Cal.App. 342, 251 P. 818, 822, the court, in referring to the case of Graybiel v. Auger, supra, added: "In other words, it is not the absolute speed at which an automobile is being driven that determines whether it is or is not being propelled at a reckless rate, but the conditions and circumstances of the highway at the instant of time must be taken into consideration, and if these conditions are such that the safety of persons and property require a much lesser rate of speed, it is the duty of the driver of the motor vehicle to slow down the speed of his car." Hearing by the Supreme Court in the case of Dam v. Bond, supra, was denied.

In the case of Davis v. Brown, 92 Cal. App. 20, 267 P. 754, the same question was presented to the court for consideration, and the rule referred to in the two cases just mentioned was approved and followed.

[3] The district where the collision occurred appears not to have been signposted, and the suggestion is presented by the appellants that therefore a speed limit of 45 miles per hour was and is allowable. But, whether signposted or not signposted, the basic law is always operative and the speed limits mentioned in section 511, supra, are at all times subject to the basic rule set forth in section 510, supra.

The fact of negligence on the part of Merrill, being practically conceded, relieves us from considering any questions as to burden of proof.

[4] The instruction given by the court to the jury, at the request of the plaintiff, and specially objected to by the appellants as being prejudicial error, is worded as follows: "It is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with pedestrians and other persons lawfully using the highway. This rule of law, applied to the conduct of the defendant, Robert Merrill, the operator of the automobile involved in this case, and, if you believe from the evidence that at the time of, and immediately before the collision in question, this defendant did not keep his automobile under control so as to avoid collisions with pedestrians and other persons lawfully using the highway, then and in that event, I instruct you that he was negligent and would be liable in damages for any loss proximately occasioned to the plaintiff by reason thereof, provided plaintiff was without fault, which proximately contributed thereto."

The errors in this instruction being set forth as follows: (1) That the instruction omits the test of ordinary care; (2) that the operator is not absolutely required to avoid all accidents; (3) that the instruction does not leave the question of negligence to the jury; (4) it is a formula instruction which does not include the necessary elements.

In these particulars we may admit that the instruction is deficient, but an examination of the record shows that at the request of the appellants the court gave the following instructions to the jury in relation to the operation of the automobile then and there being under the control of Ben Riggs. The giving of this instruction, we think, is a complete answer to any objections urged by the appellants. For that purpose we set it forth in full as follows:

"You are hereby instructed that it was part of the duty of Ben Riggs, while in the operation of his automobile, to keep the same always under control so as to avoid collision with other vehicles lawfully using the highways. He was under the duty at all times of being ever on the alert and vigilant and was likewise under the duty of anticipating and expecting the presence of other vehicles on said highway. * * *

"You are instructed that it was the duty of Ben Riggs, while in the operation of his automobile, to anticipate the presence of other vehicles upon said highways over which he was operating his said automobile. The said Ben Riggs was bound at said time to use reasonable care to anticipate the presence of other vehicles having an equal right with his said automobile to be there. You are further instructed that Ben Riggs in order to avoid a charge of negligence was under the duty of keeping his said automobile under such control as would enable him, while in the exercise of reasonable and ordinary care, to avoid a collision with another automobile, the driver of which is using proper care and caution, and if the situation were such that a person of ordinary care and prudence acting in a similar situation would slow up his said automobile and stop in order to avoid the collision, Ben Riggs, driver of said automobile, was in said situation under the duty of so doing."

[5, 6] On the question of damages and what the jury might consider, the court read to the jury section 3283 of the Civil Code, as follows: "Damages may be awarded, in a judicial proceeding, for detriment resulting from the commencement thereof, or certain to result in the future." Appellants rely upon the fact that no witness testified absolutely that future results were certain to occur, but only gave their opinions as to what might and might not occur. We take it that it is the province of the jury to determine from testimony whether the injuries are such that future detriment is certain to occur, or, rather, may be shown by the testimony to be so reasonably certain to occur as to be considered by the jury in determining the damages to be awarded. The fact that a witness may testify that in his opinion a future detriment is certain to occur does not make it certain that such detriment will occur any more than a modified opinion or statement that future detriments do occur under like conditions may reasonably be apprehended to occur.

[7] The court also gave an instruction as to what constituted an obstructed intersection. The record shows that the jury and the court, upon consent of counsel for the respective parties, viewed the premises and had before them a full view of the intersection where the collision occurred, and in support of the instruction we must assume that the conditions there presented warranted the giving of the same.

[8, 9] This brings us to a consideration of the injuries suffered by the plaintiff, and for which it is alleged that the damages awarded are grossly excessive, and that either a new trial should be ordered, or the verdict reduced.

The record shows that the plaintiff suffered a fracture of the skull, some injuries to one of her shoulders, a slight injury to the back of her neck, and some injury to the brain, causing injury to one of the eyes, apparently by the nerves being affected.

Several doctors testified, the main portion of their testimony being corroborative and supporting the testimony of Dr. Orval L. Kirkle. Before quoting his testimony, we may state that the X-ray picture taken of the plaintiff's skull did not show the full extent of the fracture by reason of the fact that it was a flat picture, and, the skull being round, the X-ray showed only about two and one-half inches of fracture, whereas it is claimed that the fracture extended for a length of about five inches, as shown by the testimony of the doctors, from where the fracture began and where it ended. The testimony of Dr. Kirkle covers practically the whole field, save as to what occurred at the plaintiff's home, which is shown by the impaired condition of the plaintiff by reason of the accident, in the testimony of her mother and the testimony of her guardian ad litem which we need not set forth herein, but which shows the continuation of the effects of the injuries suffered by the plaintiff. Dr. Kirkle's testimony is as follows:

"I am a duly licensed physician and surgeon. I was admitted to practice in 1931. I became acquainted with the Riggs family a few months before February of this year. I saw Dora Riggs professionally on the 5th of February, 1936. She was brought to my office. At that time she was very weak. She tried to walk in from the reception room, but we partly carried her and partly let her walk. She was very unstable, as far as her ability to walk was concerned. Part of the time she could answer questions perfectly all right, and then at times she would answer or not answer. Sometimes she would answer as though she did not know what we were talking about. Other times she would say, 'I didn't hear your question,' and we would have to state it again. She was in a state of shock—not extreme shock but partial shock. So far as her mental condition was concerned, she was dazed. She complained of headaches. She had a swollen head on the right side and her shoulder and neck. She stated she was nauseated but did not vomit. Examination revealed a bruise over the right shoulder and tenderness over the right side of the skull. There was no laceration. There was no bleeding from the outside. Because of the tenderness over the skull, we took an X-ray to see what it was. Later on X-rays were taken at the sanitarium. I advised that she be taken home and put to bed there. She was having severe pains, headaches and was still nauseated and complaining of it, and her blood pressure was varying at the time I was there at the house. She did have a blood pressure, which did vary a little bit, maybe five or ten points. She was apparently conscious part of the time and part of the time she was strongly out of the picture. She remained home in bed for two days. She was then taken to the St. Helena Hospital by ambulance. It was easier to care for her at the Sanitarium. We considered seriously the possibility of having to do a spinal puncture to relieve the increased blood pressure. At times it went up to 140-145 and I was afraid it would go up and we would have to do a spinal puncture to relieve the pressure, but it did not go on up and we did not have to do the spinal puncture. She remained in the Sanitarium one month. I saw her there on an average of three times a week. She was under the care of other doctors during that time. The X-rays you show me were taken at the St. Helena Sanitarium. These X-rays reveal a fracture of the right parietal region. There was a fracture beginning near the mid-line on the right side about an inch back from the ear, extending downward and forward just behind the ear into the mastoid region. The area on the flat X-ray plate measured two and one half inches, but turning, as the skull does, it would make it a much longer area. There was no displacements of the fragments and no depression. While she was in the hospital she was just semi-conscious. At times she was very nervous, very easily excited. Then she would regain total consciousness and she would be worried about what she missed or what had been going on about her. She was dizzy. During her stay in the hospital she didn't rest, but she got over that dizziness a great deal after that. The nausea continued more or less. At least, during the early part of her stay in the hospital she had to have her meals sent to her bed. Not under any consideration was she to get out of bed in the hospital. After she left the hospital she was taken to her home. At home, she was not permitted to get out of bed. Her mother waited upon her the same as the nurses waited upon her at the hospital. About the 10th of April, she was allowed to be out of bed and then only by the assistance of her mother. That was approximately five weeks after her return. She was not allowed to walk to and from the lavatory unassisted. Her condition has improved some—she can be up and around. Her first trip out of the house to go anywhere was when she came into town for Dr. Heegler's examination. That was approximately three weeks ago. There was a faint discoloration of the skin around the right eye. It wasn't a real black eye and it came on after she was in the hospital. She suffered a severe concussion of the brain. My opinion of the outcome of the injury is this—it is very likely that in the end the result will be some permanent damage. It is very frequent that we even find epilepsy, traumatic epilepsy, as we call it, following a severe brain injury. If the fracture of the skull is severe enough—if the injury is severe enough—we might get that as a result, but nobody knows, except for time, and time will only tell what will come here. No doctor could say with reasonable certainty that the results I have described would not follow. For a time she could not see, especially from the right eye. We didn't allow her to read, or try to see until she came home from the hospital, and while there she stated to me that there was a funny appearance from the right eye, and she could apparently see all right from the left, but if she would cover up her left eye, everything would be right before her. As far as I know she had no double vision. She wore glasses before this injury, though. At the time of the accident, there was probably the concussion, as I have stated, and probably some hemorrhage into the brain. The concussion clears up moderately rapidly, but in the hemorrhage it is a very slow process of clearing up and that is why I say a hemorrhage, because of the fact it has taken this long before there is any beginning of clearing up even. There is some nonconvergence of the eyes—the right eye turns upward and inward. The girl hasn't the pep she had before. You asked the prognosis so far as headaches are concerned—that is a pretty hard question to answer, but I think that—I doubt very much that she will get over those headaches entirely under from six months to two years. The eye condition is more or less permanent. We don't know how long it will last, how much we can restore. It will take lots of treatment and lots of care, with proper exercise on her part to get any of it restored. She doesn't remember as well as she did. Her ability to concentrate is very poor. She will require a great deal of treatment before she is entirely over this, that is, entirely over this so far as we can get her over it. The main treatment so far as the head is concerned, is the eye treatment and that will last over many months probably before we are through treating and caring for her eyes. That will require the services of an eye specialist. She may be able to follow her school work at sometime in the future, but I doubt very much that she will be able to attend school this coming year."

We have taken the foregoing from the appellants' summary of the testimony. Following this testimony the appellants schedule a number of cases where judgments in damage suits have been reduced and a number of others where judgments have been sustained. This schedule also appears in appellants' memorandum of points and authorities in opposition to the plaintiff's motion to dismiss or affirm. While great industry has been shown by the appellants in the collection of these cases, the question of damages is one with which an appellate court can deal with no more certainty than the jury which heard the testimony, and before which the cause was tried. The cases all practically hold that the determination of whether the allowance of damages has been excessive is in the first instance for the trial court to determine. In the instant case the question of excessive damages was presented to the trial court, and the trial court denied the appellants' motion for a new trial, which motion was based partly upon the alleged allowance of excessive damages. While the damages allowed in this case appear to be quite large, we find nothing in the record which indicates that the damages were augmented by reason of any passion or prejudice. The record shows that the case was fairly tried, and appears to have been conducted in such a manner as not to arouse any ill feeling or in such a manner as to induce the jury to seek to punish the defendants, or any one of them, rather than to award just compensation. No allowance was made for special damages, and, in considering the amount of damages awarded, we think an appellate court is justified in taking into consideration the costs which the plaintiff in such a case must incur that are not compensable as such. The damage to the brain and the injury apparently to the nerves of one of the eyes which causes the affected eye to turn up presents a serious injury for which a sum of money may to the average person seem impossible of measurement. That question we think is as much within the judgment of the jury as within the province of any court, and, unless we can say, with reasonable certainty, that such injuries will not affect the future of the plaintiff, we are at a loss to say that the damages awarded are the result of either passion or prejudice.

We do not consider that it would be at all helpful to lengthen this opinion by referring to the cases where verdicts have been modified or where damages have been allowed to stand as awarded by the jury. We may add, however, that in a number of cases it does appear that the jurors might have awarded a considerable sum in addition to the damages allowed, without crossing the line called excessive.

Being of the opinion that we are not justified in concluding that the damages in this case are neither excessive, nor were allowed by reason of any passion or prejudice, it follows that the judgment must be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

23 Cal.App.2d 54

In re MONTIJO'S ESTATE.

GARCIA et al. v. SIBLEY.

Civ. 1887.

District Court of Appeal, Fourth District,
California.

Oct. 4, 1937.

Rehearing Denied Nov. 2, 1937.

Hearing Denied by Supreme Court
Nov. 26, 1937.

1. Executors and administrators 🔑506(3)

Evidence that executors of deceased's estate executed interest-bearing notes for money borrowed under authority of court order providing for payment of interest was sufficient to support probate court's inclusion of interest in amount allowed payee, though latter's bookkeeper carried charges and credits as open account.

2. Executors and administrators 🔑225(1)

A claim on account for decedent's unsecured debts to claimant, who filed petition for allowance thereof after expiration of time for presentation of claims against estate, was improperly allowed by probate court (Probate Code, §§ 707, 716).

3. Executors and administrators 🔑98

A claim against decedent's estate by general creditor, from whom executors borrowed money, for amount paid abstract company for legal services, was improperly allowed, where court order did not permit executors to borrow money for such purpose and there was no evidence that such expenditure was for estate's benefit.

◆

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

In the matter of the estate of Amado Montijo, deceased. From an order allowing W. S. Sibley a stated sum as a general creditor of the estate, Nora Garcia and another, executors thereof, appeal.

Modified, and affirmed as modified.

Newby & Newby, Dee Holder, and Paul Leiter, all of Los Angeles, and J. A. Chase, of Visalia, for appellants.

Waldo E. Burford, of Porterville, for respondent.

MARKS, Justice.

This is an appeal from an order of the superior court of Tulare county sitting in probate determining that W. S. Sibley is a general creditor of the estate in the sum of $2,373.05.

Appellants attack the order on the following grounds: (1) That it included interest charged in the amount of $2,021.01 on what is termed a "running account" upon which no interest should have been allowed; (2) that it improperly included $391.39 on what is called the "Sanderson account transfer"; (3) that it improperly included $7.50 paid to the Tulare Abstract Company for legal services.

[1] Amado Montijo died on April 23, 1931, the owner of an interest in an orange grove in Tulare county. At that time he was indebted to Sibley in a considerable sum, secured by a continuing mortgage on the crops of oranges. The executors had no money to conduct the farming operations, and on three separate occasions secured formal permission of the probate court to continue the operations and for that purpose to borrow money on their unsecured notes bearing interest at not to exceed 8 per cent. per annum. Notes in a total amount of $8,100, all payable to Sibley, were executed by the executors of the estate. The earlier notes bore interest at the rate of 7 per cent. per annum and the later at 8 per cent. per annum.

Sibley was in the business of packing and shipping citrus fruits and handled the crops from the estate property. His bookkeeper did not set up a note account with the estate but carried the charges and credits as an open account. He charged the estate with each advancement made by Sibley and credited it with the returns from the oranges as they came in. While the bookkeeper described a rather complicated method used by him of computing interest, it amounted to a charge of 7 per cent. interest on the actual net balances owed by the estate.

Appellants argue that, as it was an open running account, interest could not be charged on it until demand for payment was made. They have entirely overlooked the fact that the indebtedness was evidenced by promissory notes executed by them under authority of court orders; that all of these notes provided for payment of interest; that the court orders authorized the payment of interest. This is sufficient evidence of an agreement to pay interest to support this portion of the order. It is evident that the earlier notes were paid by the returns from the sales of oranges so that the notes unpaid at the time of trial bore interest at the rate of 8 per cent. per annum. The method used by the bookkeeper in keeping the account cannot change the contract between the parties and destroy the promise of the executors to pay interest. They cannot complain because Sibley chose to forego 1 per cent. of the interest rate to which the notes entitled him. The estate was benefited, not injured thereby.

[2] The record shows that the "Sanderson account" represented some unsecured debt owing by deceased to Sibley during his lifetime. No claim was presented against the estate for this debt. The time for presentation of claims had expired before Sibley's petition was filed. The amount of this claim, $391.39, was improperly allowed in the order. Sections 707, 716, Probate Code.

[3] The payment of $7.50 to the Tulare Abstract Company for legal services was improperly allowed. The court orders did not permit the executors to borrow money for any such purpose. There is nothing in the record to show that this expenditure was for the benefit of the estate.

There seems to be an error of 19 cents in favor of Sibley in the computations of the trial court.

The $2,373.05 found in the order as owing and unpaid by the estate to Sibley is reduced by the sum of $399.08 to $1,973.97, and as so modified the order is affirmed. The parties will pay their own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

---

22 Cal.App.2d 574

CLEAVELAND v. INTER-CITY PARCEL SERVICE, Inc., et al.

Civ. 11309.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1937.

Rehearing Denied Oct. 21, 1937.

Hearing Denied by Supreme Court Nov. 18, 1937.

1. Limitation of actions 🔑29(2)

A party cannot extend a period of limitation by purporting to rely on a book account and then by process of calculation based thereon seek to establish an amount due under the terms of an oral agreement that bears no relation to the book, when enforcement of the oral agreement is barred by limitation (Code Civ.Proc. § 337, subd. 2; § 339, subd. 1).

2. Limitation of actions 🔑21(1)

Provisions of express contract and not entries in book account control running of limitations.

3. Limitation of actions 🔑29(2)

An express contract which defines the duties and liabilities of the parties, whether it be oral or written, is generally not an "open account" as respects running of limitations.

[Ed. Note.—For other definitions of "Open Account," see Words & Phrases.]

4. Limitation of actions 🔑27

An action on alleged book account to recover rebate on increased terminal charge to which plaintiff claimed to be entitled under terms of an express oral agreement, although no evidence of the oral agreement appeared in the book account either literally or by implication, was barred by two-year limitation although brought within four-year period allowed for actions upon a book account (Code Civ.Proc. § 337, subd. 2; § 339, subd. 1).

◆

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by R. B. Cleaveland against the Inter-City Parcel Service Inc., S. B. Cowan, and others. Judgment for plaintiff, and all defendants but the named individual defendant appeal.

Reversed as to appellants.

Hugh Gordon, of San Francisco, and Raymond Tremaine and Franklin L. Knox, Jr., both of Los Angeles, for appellants.

Louis T. Fletcher, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in an action on a book account. The facts are as follows: In 1925 and prior thereto, defendant S. B. Cowan and the four other individual defendants were engaged in the business of hauling packages and freight from Los Angeles to points elsewhere in California. Each was operating under authority of the Railroad Commission of the state of California and according to the laws applicable to common carriers of freight by automobile truck. Each had a separate route, operated individually, and there was no co-operative agreement among them.

In 1925, the United Parcel Service of Los Angeles, Inc., a corporation, secured operative rights from the Railroad Commission and became active in the distribution of package freight throughout the entire area adjacent to Los Angeles, including all of the points served by the individual defendants above mentioned. In order to meet this competition said individual defendants initiated the scheme of forming a corporation, namely, the defendant Inter-City Parcel Service, Inc., to enable them to offer the shipping public a complete service for package distribution throughout the territory adjacent to Los Angeles, at the same tariff rates offered by the United Parcel Service; accordingly, the defendant corporation was formed in 1925, and its stock was divided equally among said defendants. Contracts were entered into between the corporation and its individual directors, the defendants herein, and also with eighteen or twenty others, operating trucking lines, who were not stockholders but who desired to participate in the same arrangement to handle freight through the Inter-City. Among other things, the Inter-City acted as the unified pick-up terminal agency in Los Angeles for all of the carriers party to the arrangement; it collected the amounts due from the shipper to the carrier; kept books of account and rendered settlements with its contracting carriers at regular intervals; it also collected packages from the retail stores and other shippers in Los Angeles, brought them to the terminal of the Inter-City, and assembled and sorted them for the convenience of the respective carriers. Inter-City also owned a number of trucks which were rented, by the company, to those carriers with whom it had the above-described contractual relations. For this service said carriers were charged a certain amount per package by Inter-City, which was termed a "depot" or "terminal" charge.

The income of the Inter-City was reduced substantially by reason of an order of the Railroad Commission, issued in April, 1927, which prohibited the company thereafter from renting its trucks. In order to meet the reduction of its income as a result of this curtailment, the terminal charge to the carriers was increased. The board of directors of Inter-City, which consisted of the five stockholders above mentioned, directed defendant Cowan to interview all of the contracting carriers and to arrange with them to continue their relations with Inter-City under the new increased depot or terminal charge. The Pasadena Express and Freight Service, owned and operated by Mrs. Birdie M. Macy, was one of the carriers operating in conjunction with the Inter-City, as above described. Excerpts from defendant Cowan's testimony, with respect to his conversation with Mrs. Macy on the subject of the increased terminal charge, are as follows:

"Q. (By the Court): Did you testify that when you went back to the Macys that they refused to submit to a higher terminal charge than five cents? A. They did, yes. * * * They agreed to leave the money there temporarily, just sort of helping along, at the same time they had the money, it was still due them; they knew we didn't have the money right then, and I told them they would have to agree to some assessment or something, some other method for the Inter-City to carry on, and that was the arrangement.

"Q. (By Mr. Tremaine): Well, you said it was the assumption. It did not have any particular contingency that they were to be paid? A. Well, they was to be paid. They wouldn't agree to accept it altogether. * * * And it was reserved as to whether we got the money or not. They were willing to help us along temporarily.

"Q. And when the Inter-City did get the money they would make the payments; is that it? A. No, when the Pasadena Express had to have it, why they would come and get it.

"Q. When was it you had this oral conversation with the Macys which you have just been telling his Honor about? A. Well, in the spring or summer of 1927. We didn't pay anybody for a number of months. * * *

"Q. (By Mr. Gordon): Mr. Cowan, when you talked to the Macys about this terminal charge some time in 1927, did you talk to both Mr. and Mrs. Macy? A. Yes.

"Q. Who did you talk to first? A. Mr. Macy. * * * On Alameda Street, in a restaurant.

"Q. All right, what was said between you and Mr. Macy at that time? A. The substance of it was that we couldn't give him all of the money. If I remember rightly, he said—he said we owed him money and wanted to know when he was going to get some and I told him the action that was taken by the Board of the Inter-City. * * * I told him the directors wanted to have the little carriers help finance the Inter-City and figured they should be—that they should do it. * * * I told him that the Inter-City wanted all the other carriers, other than the stockholders, to help finance the Inter-City.

"Q. Did you tell him they wanted to get more terminal charge in sufficient amount to pay the overhead? A. No. * * * That we would only charge him, including the other carriers, the difference between the ten cents a package and what his tariff rate was. * * * he said, 'How do you expect me to pay money that I owe?' * * * I think that he left then, and then I met Mrs. Macy and him both, if I remember correctly, over in their office. In Los Angeles. * * * About three or four days after this first day. * * * I came and asked them whether they figured they could leave that money in there, that I was to report back to the Inter-City directors and give them their answer. They said to the effect that they might help us along temporarily, but couldn't do it forever and that if I wanted my money or they wanted their money they would have to come over and collect."

Excerpts from Mrs. Birdie M. Macy's testimony on the same subject, are as follows:

"Q. * * * did you have any discussion with Mr. Cowan or with any member of the Inter-City with reference to altering or changing the terminal charges? A. Mr. Cowan asked us about getting more money, * * * as to the time I have no idea, but I know it was about the date Mr. Cowan said, and he said they were losing business and would have to have more money for operating expenses and he wanted to know if we would agree to a higher terminal charge. * * * He talked to me in my office at Fifth and Alameda. * * * I believe Mr. Macy was present at the time but I am not sure. * * *

"Q. Do you know whether it was about the time that the railroad commission rendered its decision with reference to the leasing of the cars? A. Yes, I know it was along near that time.

"Q. Just state the conversation, go right ahead. What you said and what Mr. Cowan said. A. Well, I told him that I did not believe I could pay a higher terminal rate and that our obligations did not justify our taking a cut, but I would be willing to let the money remain in the company to help them until such time as we needed it, and that is all, that we would accept ten cents a package and pay a five cent terminal charge.

"Q. Right there, did you have any other conversation with Mr. Cowan about that same matter except right around that time? A. I don't recall. I talked it over a number of times there with him, just in a general way; when I needed money and came to him for money, the subject would be brought up but I don't recall just what it was about.

"Q. Well, was that the only conversation you had concerning the subject of whether or not you would consent to accept something different than a five cent rate? A. Yes."

The Pasadena Express continued to operate in conjunction with Inter-City throughout the years 1927 and 1928 and the first two months of 1929, during which period the business of each was conducted as before. In February, 1929, Inter-City sold out to United Parcel. It is for the period from January 2, 1927, to March 1, 1929, that R. B. Cleaveland, plaintiff herein (as assignee of Mrs. Macy, owner of the Pasadena Express), seeks to recover the difference between the new terminal charge and the old terminal charge. The action herein was filed October 4, 1930, against the Inter-City corporation and also against the five individually named defendants on the respective liability of each as a stockholder of Inter-City. The trial was not commenced until January 22, 1936. The complaint, which was originally in four counts, at the conclusion of the trial was amended to "conform to proof" and alleges but one cause of action; namely, an action "upon a book account consisting of more than one entry," obviously an effort to seek refuge under the provisions of section 337, subdivision 2, of the Code of Civil Procedure, and to avoid the operation of section 339, subdivision 1, of the Code of Civil Procedure. The former section fixes the period of limitation prescribed for the commencement of actions at four years, the latter section at two years.

It is unnecessary to devote attention to the several findings which are wholly beside the limited issues that may be raised in the cause of action relied upon; namely, an action upon a book account. It is sufficient for the purposes of the opinion herein to observe that the court found, in substance, that defendant Inter-City Parcel Service Inc., had become indebted to Mrs. Birdie M. Macy upon a book account as of March 1, 1929. Judgment was rendered against the defendant stockholders upon stockholders' liability. From this judgment defendants appeal, with the exception of defendant S. B. Cowan, who acknowledged a substantial interest with plaintiff in the action.

The contention of appellants that the action is barred by the two-year period of limitation must be sustained.

[1] For proof of the alleged cause of action plaintiff depended chiefly, if not altogether, upon the books of the defendant corporation, as well as upon the testimony of Mrs. Macy and defendant S. B. Cowan. The books of the Inter-City corporation, upon which, as above stated, plaintiff seeks to establish the cause of action, are destitute of any evidence, direct or indirect, that tends in the slightest degree to support plaintiff's action on a book account. To the contrary, the books establish the fact that plaintiff is entitled to nothing. After the Inter-City established its increased terminal charge and after the conversation between defendant Cowan and Mrs. Macy, hereinbefore detailed, all of the entries in the books of the Inter-City are based upon the increased terminal charge. Relying altogether upon the books of the Inter-City, plaintiff, as heretofore stated, seeks to recover the difference between the new terminal charge and the old terminal charge. The right to recover this amount, however, depends altogether upon proof of a fact wholly independent of the books of defendant corporation; namely, an oral agreement between the Inter-City corporation and Mrs. Macy, as revealed by evidence of the conversations between Mr. Cowan and Mrs. Macy, hereinbefore outlined. It should be noted here that the other individually named defendants deny the existence of this agreement and contend that the increased terminal charge was collected without qualification. It should also be noted that, during all of the period of time in which the new terminal charge was collected, the payments due, and the regular settlements between Inter-City and Mrs. Macy, were calculated on the basis of the increased terminal charge as shown by the books of the Inter-City corporation. It is evident, therefore, that such a situation gives rise to no cause of action on a book account. If plaintiff has any cause of action at all, it is only a cause of action based upon the oral agreement above referred to which, in effect, was but a loan by Mrs. Macy to the Inter-City corporation. Neither the item of the loan, nor evidence of the oral agreement capable of identification as such, appears in the book account either literally or by implication. Plaintiff cannot thus extend the period of limitation by purporting to rely upon a book account, and then, by a process of calculation based thereon, seek to establish an amount due under the terms of an oral agreement that bears no relation to the books, and when the enforcement of said oral agreement under the law is barred by the statute of limitations. As has been hitherto declared, "The distinction, as a matter of pleading, between a book account and an ordinary contract debt not founded on a writing, is only important when * * * the statute of limitations is involved and where the question arises whether suit may be commenced within four years, or must be begun within two years after the cause of action has accrued." Hansen v. Burford, 212 Cal. 100, at page 107, 297 P. 908, 911, citing Wright v. Loaiza, 177 Cal. 605, 171 P. 311, 312. It has been held that recovery cannot be had for items not contained in a book account. Egan v. Bishop, 8 Cal.App.(2d) 119, at page 126, 47 P.(2d) 500. In the case of Wright v. Loaiza, supra, the court, in discussing section 337, subdivision 2, and section 339, subdivision 1, Code of Civil Procedure, declared: "It may fairly be assumed that the idea underlying the enactment of both subdivisions * * * was that a longer period of limitation might well be allowed where the existence of the claim sued upon was supported by some kind of written evidence. Where, on the other hand, the establishment of the contract rests on oral testimony only, the law requires the action to be brought before the lapse of time may prevent the production of witnesses, or impair their memories. If this view be correct, the action against Dolores must be regarded as one upon an oral contract, and not one upon a book account. There is no account or other writing which in any way indicates her liability. To connect her with the transactions at all, resort must be had to parol testimony."

[2, 3] In the recent case of Lee v. De Forest (Cal.App.) 71 P.(2d) 285, 290, the

nature of an action on a book account was considered, which case, as well as the authorities therein cited with reference to the subject, are applicable to the case at bar. Therein the court declared, "We think that plaintiff's attempt to recover by alleging an open book account when his right of action is based upon the terms of an express contract ought not to be allowed. It may be noted, in this connection, that the second cause of action was not included in plaintiff's first complaint, but was added by amendment after defendant had set up the defense of the statute of limitations. * * * It also has been held that the provisions of an express contract, and not the entries in an account kept by plaintiff, control the running of the statute. In Connor Livestock Co. v. Fisher, 32 Ariz. 80, 255 P. 996, 57 A.L.R. 196, the plaintiff, who had sued to recover unpaid rent under three oral leases, sought to avoid the effect of the statute of limitations which had been set up by the defendant by including his claim for rent in an 'open account' for money theretofore advanced. The Arizona Civil Code of 1913, par. 711, subd. 2, provided that 'actions upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant' shall be barred within three years after the incurrence of the last item of indebtedness therein entered. It was there said, in part: 'An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is not, as a rule, an open account.' In the case of Stewart v. Claudius (Cal.App.) 65 P.(2d) 933. It was held that in an action to recover instalments due under a written contract, 'the provisions of the contract are controlling as to the running of the statute; and even though the plaintiff keeps a memorandum book in which he charges the accounts accruing under the contract and credits therein the several payments made, the entries in the book account do not fix a new date for the running of the statute.' And in People v. California Safe Deposit Co. (People v. Magee), 41 Cal.App. 727, 183 P. 289, 291, in holding that a right of action for the payment of money in installments pursuant to the terms of a contract was barred, the court declared: 'Appellant further contends that his cause of action is based upon a book account, in which the last entry was made on July 7, 1917, and therefore his cause of action is not barred. The alleged book account was a memorandum kept by appellant, in which he charged the amounts accruing under the contract and credited the several payments made, including that collected by him as the result of the judgment in the former suit above referred to. Appellant's alleged cause of action is based upon his contract and not upon this account. The writing is a mere memorandum of debts accruing from an entirely independent source.'"

[4] In the case at bar there is no account, or other writing, which in any way indicates the liability of defendants. To attach any liability at all, resort, as in the Wright Case, supra, must be had to parol testimony. The finding, therefore, that the Inter-City Parcel Service, Inc., had become indebted to Mrs. Birdie M. Macy upon a book account is wholly unsupported by the evidence. To the contrary, the evidence indicates but one cause of action; namely, an action upon an express oral agreement, to which action those defendants who properly pleaded the bar of the statute of limitations were entitled to judgment.

For the foregoing reasons the judgment, as to the appellants, is reversed.

We concur: HOUSER, P. J.; YORK, J.

23 Cal.App.2d 57

LESEM v. GETTY, County Auditor and Controller et al.

Civ. 2047.

District Court of Appeal, Fourth District, California.

Oct. 4, 1937.

Hearing Denied by Supreme Court Nov. 26, 1937.

1. Counties 🔑3

The general purpose of constitutional provision from which counties derive their authority to adopt charters is to give local self-government or county home rule to counties by means of charters framed under such provision (Const. art. 11, § 7½).

2. Counties 🔑2

Proviso in constitutional provision that county charter provisions relating to powers and duties of boards of supervisors and other county officers shall be controlled by general laws is repugnant to general purposes of constitutional provision and should be disregarded (Const. art. 11, § 7½, subd. 4).

3. Municipal corporations 🔑126

A chartered city has right under constitution to create offices not provided for by law (Const. art. 11, § 7½).

4. Health 🔑7(1)

Statute empowering board of supervisors to appoint county health officer who shall be employee of county and not county officer applies solely to unchartered counties and is inoperative in chartered counties which, under authority of their charters, have provided for health officer, regardless of particular title given him and regardless of variance in official title given to the office in various enactments (Pol.Code, § 4225, as amended by St.1935, p. 1974; Const. art. 11, § 7½).

5. Estoppel 🔑62(3)
Health 🔑7(1)

One appointed director of public health and sanitation of San Diego county, although appointed before ordinance creating office was passed, having performed duties of his office and accepted emoluments from it, was a de facto director and was estopped from denying either legality of creation of his office or of his appointment thereto, by urging that term of office and manner of appointment were not set forth in charter in accordance with constitutional provision (St.1933, pp. 2814, 2818, 2820, 2821, 2829, 2833, §§ 12 (a, e, g), 13, 14, 37, 53; Const. art. 11, § 7½).

6. Health 🔑7(1)

Attempt of administrative code for San Diego county to create office of director of public health and sanitation *held* effective, as against contention that purpose of administrative code was to provide for conduct of various offices of county and that it was not within purport of code to create office, since there is no requirement that ordinance shall relate to but one subject or that its title should disclose all its purposes (St.1933, pp. 2814, 2818, 2820, 2821, 2829, 2833, §§ 12 (a, e, g), 13, 14, 37, 53; Const. art. 11, § 7½).

7. Health 🔑7(2)

Director of public health and sanitation of San Diego county *held* not entitled to fees accruing as result of his performance of duties as local registrar of vital statistics, in addition to salary paid by county, in view of provision of San Diego county charter that all county officers by whom fees are collected for the performance of official duties, "or otherwise," shall pay such fees without deduction into county treasury, as against contentions that his appointment as local registrar by state was to separate office or employment, and that county had no authority to require payment to it of his fees as local registrar (St.1915, p. 575, as amended; St.1933, pp. 2814, 2818, 2820, 2821, 2829, 2833, §§ 12(a, e, g), 13, 14, 37, 53; Const. art. 11, § 7½).

Petition for mandamus by Alex M. Lesem against R. W. Getty, Auditor and Controller of San Diego County, and another, on which an alternative writ was issued.

Peremptory writ of mandate denied and alternative writ discharged.

Stearns, Luce, Forward & Swing, Albert J. Lee, Adam Thompson and Renwick Thompson, all of San Diego, for petitioner.

Thomas Whelan, Dist. Atty., William A. Glen, Chief Deputy Dist. Atty., and Carroll H. Smith, Deputy Dist. Atty., all of San Diego, for respondents.

MARKS, Justice.

San Diego county is organized and operating under a charter. Stats.1933, p. 2814. Petitioner is a duly licensed and practicing physician, and has been and is performing the duties of health officer or director of public health and sanitation of San Diego county. He is also director of public health of the city of San Diego and is performing the duties of health officer in several of the smaller municipalities of the county. On January 5, 1934, the state registrar of vital statistics appointed him local registrar of vital statistics for the term ending January 5, 1938, for registration districts No. 3701 (city of San Diego), No. 3703 (National City), and No. 3763 (rural San Diego county). Since his appointment he has been performing his duties under it. Between January 1 and March 1, 1937, there became due $413.75 in fees under the terms of the Vital Statistics Act (Stats.1915, p. 575, as amended) for services rendered by him as local registrar. On the last day of March, 1937, the state registrar of vital statistics certified the amount to respondent R. W. Getty, as auditor of the county of San Diego, and petitioner made demand for a warrant in payment of this bill. The demand was refused, and this action followed to compel the auditor to draw the warrant and respondent Will S. Heller as treasurer of the county of San Diego to pay it.

For performing the duties of director of public health of San Diego city, petitioner receives $162.50 monthly and for serving as health officer of La Mesa $50 monthly, of Oceanside $25 monthly, and of National City $50 monthly. As these amounts were received by him he paid them into the treasury of the county of San Diego. He received $450 monthly from the county in payment of his services as director of public health and sanitation.

Petitioner seeks to establish his right to receive and retain the fees as local registrar of vital statistics by an ingenious theory which is strongly and ably supported in the briefs of his counsel. He maintains that he is the regularly appointed, qualified, and acting director of public health (health officer) of the city of San Diego. This is not seriously disputed. He further maintains that he is not lawfully the director of public health and sanitation (health officer) of the county of San Diego; that his appointment as local registrar of vital statistics could not have been because of the services he was rendering the county but because of his position with the city; that, therefore, the county had no interest in or right to claim the fees for his services to the state. He further argues that, if he be considered the de facto director of public health and sanitation (health officer) of the county of San Diego, his appointment by the state was to a separate office or employment; that his compensation for such services was under authority of a state employment and in payment for services rendered the state; that it was separate and distinct from his employment by the county of San Diego; that the county had no legal power or authority to require payment to it of his fees as local registrar which were earned by him under an office or employment by the state which was independent of any control by the county. A decision of the questions thus presented requires a careful consideration of constitutional and statutory provisions and of the charter and ordinances of the county of San Diego.

Counties derive their authority to adopt charters under the provisions of section 7½ of article 11 of the Constitution. A county charter must provide for a board of supervisors and other officers described in subdivisions 1 to 6, inclusive, of the section, in none of which is a health officer or director of public health and sanitation mentioned. The section also provides:

"All charters framed under the authority given by this section, in addition to the matters hereinabove specified, may provide as follows:

"For offices other than those required by the Constitution and laws of the State, or for the creation of any or all of such offices by boards of supervisors, for the election or appointment of persons to fill such offices, for the manner of such appointment, for the times at which and the terms for which such persons shall be so elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors."

[1] In considering the effect to be given and the interpretation to be placed upon the provisions of section 7½ of article 11 of the Constitution, we should bear in mind the clear statement in Reuter v. Board of Supervisors, 220 Cal. 314, at page 326, 30 P.(2d) 417, 422, as follows:

"The general purpose of section 7½ of article XI of the Constitution was to give local self-government or county home rule to counties of the state by means of charters framed under said constitutional amendment. That this was the intent and purpose of the section clearly appears from the language of the section itself, which declares that, after the charter has been approved by the Legislature, 'such charter shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided * * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter.' In the arguments prepared in support of said constitutional amendment and sent to the voters of the state immediately preceding the election at which the amendment was adopted, it was said, among other things: 'This proposal to amend the organic law occupying the second place on the official ballot for the ensuing special election on constitutional amendments, known as the "County Home Rule Amendment," is a logical growth from the successful administration of "Charter cities" formed under the "Home Rule" provisions of our constitution relating to municipalities.' Continuing the arguments, it is expressly stated that 'The main object of this amendment is to place the local government of each county in the hands of its citizens—in other words it is designed to give "home rule" to counties.' * * *

"The people of the state in the adoption of this amendment had good cause to believe, and evidently did believe, that they were thereby providing a means whereby they might have home rule in their local and county affairs, including the right, in the words of the amendment, to provide for the powers and duties of their county officers. The amendment as adopted by them, when construed as a whole, is not only susceptible of such a construction, but cannot be given any other reasonable interpretation."

[2] It should be further observed that in the same case the following clause in subdivision 4 of the section (Const. art. 11, § 7½) which "provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws," was held repugnant to the general purposes of the section and in conflict with them. It was the conclusion of the court that it should be disregarded. See, also, Mapes v. Williams, 2 Cal.(2d) 177, 39 P.(2d) 421; County of Tehama v. Winter, 56 Cal.App. 341, 205 P. 97; Simpson v. Payne, 79 Cal.App. 780, 251 P. 324; Pullen v. Garrison, 85 Cal.App. 706, 259 P. 1021; Wilkinson v. Lund, 102 Cal.App. 767, 283 P. 385.

Sections 13 and 14, article 4, of the county charter, provide for the elective and appointive officers of the county. There is no health officer or director of public health and sanitation listed among them.

Article 3 of the charter defines the general powers of the board of supervisors. Among them are the following:

"(a) To appoint or to provide for appointment, by ordinance, unless otherwise provided by this Charter, all County or Township officers other than elective officers, and all officers, assistants, deputies, clerks and employees whose appointment is not specifically provided for by this Charter. * * *

"(e) To establish, by ordinance, as public necessity may require, offices other than those required by the Constitution and the laws of the State, and provide for the appointment of persons to fill the same, and fix the compensation therefor. * * *

"(g) To establish and adopt, by ordinance, a complete Administrative Code which shall be the rules and regulations pertaining to and prescribing in detail the duties and systems of office, institutional and departmental management, accounts and reports for each of the offices, institutions and departments of the county, all of which rules shall not be inconsistent with general law and the provisions of this Charter." Section 12.

Section 37 of article 7 of the charter contains the following provision: "All County and Township officers, employees, boards and commissions by whom fees are collected for the performance of official duties, or otherwise, and all officers or employees collecting or receiving moneys pertaining to or for the use of the County, shall pay or transmit all such fees and moneys, without deduction therefrom, into the County Treasury, daily, and shall thereupon be credited by the Treasurer and Auditor with the amount so paid."

On November 13, 1933, the board of supervisors of San Diego county adopted an administrative code for the county. Rule C of section 7 of this code provides as follows: "Said Board shall appoint a County Director of Health and Sanitation, subject to the approval of the Board of Supervisors, who shall be the executive officer thereof and who shall have charge of enforcing all County ordinances and State laws applicable and all regulations adopted by said Board pertaining to health and sanitary matters, and all orders, quarantine regulations and rules prescribed by the State Board of Health and all statutes pertaining to public health and sanitation and vital statistics. Said County Director shall have general supervision over all hospitals and clinics utilized for isolation and for the treatment of communicable diseases and/or of child guidance clinics and/or any other clinics that may be established for the preventative treatment of physical or mental conditions insofar as is provided by County ordinances and California State law."

Ordinance No. 52, new series, effective for the fiscal year 1936-1937, fixed the compensation of the director of public health at $450 per month. Section 5 of that ordinance provided as follows: "The salaries, wages, fees, mileage, compensation and expenses provided for herein shall be in full for all official services performed, and provided further, that all fees, mileage, expenses, commissions and compensation now or hereafter provided by law to be paid to any county or township officer either as such officer or as the agent of the State of California or any officer thereof, or as the agent of any political subdivision thereof, or of any officer of such political subdivision, for any official service or otherwise, except as herein otherwise provided, shall be paid into the county treasury as required by the Charter and Administrative Code, and placed to the credit of the general fund, unless some other fund is especially designated by law."

Ordinance No. 3, new series, adopted on July 3, 1933, created the department of public health of the county of San Diego under authority of and in almost the precise language of section 53 of article 11 of the charter which gave the supervisors power so to do. It was provided that the department of public health be administered by a board of health. The minutes of a meeting of the board of health held on August 15, 1933, show that petitioner was then appointed director of health of San Diego county. On August 30, 1933, he was appointed director of public health of San Diego county by the board of supervisors. There seems to have been no subsequent appointment made, although petitioner has been performing his duties and drawing his salary from the county.

[3] A fair construction of the constitutional provisions give a chartered city the right to create offices not provided for by law. Petitioner points out that section 4225 of the Political Code, as amended by St. 1935, p. 1974, empowers a board of supervisors to appoint a county health officer who shall be an employee of the county and not a county officer. From this they argue that, as the general law provides for the filling of this position, the supervisors have no right to create the office of director of public health or health officer.

[4] As we have already seen, section 7½ of article 11 of the Constitution was intended to permit counties to adopt a complete plan of home government and that the clause subjecting a board of supervisors to the control of general laws must be disregarded as in conflict with the general purposes of the section. Reuter v. Board of Supervisors, supra. Under the authorities already cited, this provision of section 4225 of the Political Code must be held to apply to unchartered counties and to be inoperative in chartered counties which, under authority of their charters, have provided for a health officer, regardless of the particular title given him. The fact that there was a variance in the official title given to the office in the several legislative enactments can be given no weight here.

Petitioner points out that the charter became operative on July 1, 1933; that petitioner was appointed in August, 1933; that, assuming that the administrative code was sufficient to create the office of director of public health and sanitation, this ordinance was not passed until November 13, 1933. From this he argues that he was appointed to an office that did not exist and, as there was no subsequent appointment, he did not become director of public health and sanitation of the county.

A similar situation was before the Supreme Court in the case of Buck v. City of Eureka, 109 Cal. 504, 42 P. 243, 30 L.R.A. 409. Certain sections of the Political Code were made part of the charter of the city of Eureka. They empowered the common council to create the office of city attorney, which power was never used. However, Buck was appointed city attorney, acted as such officer, and drew monthly compensation for his services. The Supreme Court was of the opinion that the charter gave the office of city attorney a potential existence sufficient for it to be filled by a de facto if not a de jure officer. The court cites with approval and discusses the rules laid down in the following cases: In re Ah Lee (D.C.) 5 F. 899, 6 Sawy. 410; Carleton v. People, 10 Mich. 250; Yorty v. Paine, 62 Wis. 154, 22 N.W. 137, and Fowler v. Bebee, 9 Mass. 231, 6 Am. Dec. 62. In each of them it was held that, where an officer was appointed before the law creating the office went into effect, the appointee was a de facto officer. There seems to be a general rule running through many cases, except election contests, to the effect that the right to hold, occupy, and enjoy a public office, where one is performing its duties, should be tried directly in quo warranto proceedings and not attacked collaterally.

On pages 515-517 of 109 Cal., 42 P. 243, 246, 30 L.R.A. 409 of the Buck Case it is said:

"The case of Smith v. Lynch, 29 Ohio St. 261, is nearly a parallel case with the one at bar. The legislature of Ohio authorized villages and towns to establish boards of health and appoint members. The village of West Cleveland, by a void ordinance, attempted to do this. The members appointed qualified and entered upon the discharge of their duties, and were accepted and regarded by the public as such members. The opinion of the court, delivered by Welch, C. J., is as follows: 'The questions argued by counsel are: (1) Had the superior court jurisdiction? (2) Are the requirements of the statute as to the manner of passing the ordinance mandatory, or are they merely directory? (3) If these requirements are mandatory, are the persons so acting to be regarded as a board of health de facto? We are satisfied that the last named of these questions must be answered in the affirmative. It is unnecessary, therefore, to consider the first and second questions. In other words, we think that, under the circumstances, the board is to be regarded as a board de facto. Whether it was a board de jure, and whether the superior court had jurisdiction of the case, became, therefore, immaterial questions. It is claimed by counsel for the plaintiff that this is not a case where an office has been filled, and its duties performed, by parties not legally appointed or qualified, but a case where there was no office to be filled. We do not so understand the law. The statute (60 Ohio Laws, 200) creates the office. It authorizes the council to "establish" the board, and to fill it by appointment. True, until the council act in the premises, it is a mere potentiality in their hands; yet it is none the less an office, known to the law. Where the council assumes to establish the board under the law, and to appoint its members, there is no good reason why an irregularity or illegality in the act of establishing the office, any more than an irregularity or illegality in the appointment of the officers, should be held as rendering the acts of the officers void, and themselves mere trespassers. The reasons —the considerations of public policy— which exist in one case exist equally in the other. It is enough that the office is one provided for by law, and that the parties have the color of appointment, assumed to be and act as such officers, and that they are accepted and acknowledged by the public as such, to the exclusion of all others. Such was the case here. There was both the color and the fact of office.'

"The office under consideration [city attorney of Eureka] was given a potential existence by the acts of the legislature in the sections of the Code above quoted. The plaintiff, having accepted the appointment to it, and received the emoluments of it, is estopped from endeavoring to show to his own advantage that the council did not follow a prescribed mode in perfecting that potential existence."

[5] Under the rule just announced, petitioner, having been appointed director of public health and sanitation of San Diego county, having performed the duties of his offices and accepted the emoluments from it, must be held to be de facto if not de jure director of public health and sanitation of San Diego county and estopped from denying either the legality of the creation of his office or of his appointment to it. See, also, Woodward v. Fruitvale Sanitary Dist., 99 Cal. 554, 34 P. 239.

Petitioner contends that the attempt to create the office of director of public health and sanitation is void because the term of office and manner of appointment is not set forth in the charter as seems to be required in the already quoted portion of the Constitution. This is but another way of attacking the legality of the creation of the office and of his appointment to it. The doctrine of estoppel already considered is sufficient answer to this argument. A similar situation was before the court in the case of Decker v. Board of Health Commissioners, 6 Cal.App.(2d) 334, 44 P.(2d) 636, 637, where a provision of the Los Angeles city charter was under consideration. The court said: "The charter of the city of Los Angeles has no provision relative to the tenure of office of the health officer, hence the petitioner held office at the pleasure of the respondent, subject only to the charter limitations as to his removal, if any."

If we should assume, without holding, that petitioner comes within the classified service, his term of office would be fixed by the civil service regulations.

[6] Petitioner urges that, as the purpose of the administrative code was to provide for the conduct of the various offices of the county, it was not within its purport to create an office, and that therefore its attempt to create the office of director of public health and sanitation should not be given any effect. We cannot agree with this reasoning. There is no requirement that an ordinance shall relate to but one subject or that its title should disclose all its purposes. Ex parte Young, 154 Cal. 317, 97 P. 822, 22 L.R.A.(N.S.) 330; Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; Ex parte Yung,

7 Cal.App. 440, 94 P. 594. It follows that the administrative code, when lawfully enacted, created the office.

[7] Petitioner's contention that he was serving the public in a dual capacity, one as local registrar of vital statistics under the state and the other as director of public health and sanitation under the county, that the offices held were separate and distinct, that neither employer could dictate to him the disposition of the money paid him by the other, cannot be sustained. He was appointed by the state because he was serving as health officer of the county of San Diego. After his earned fees were paid, it was no concern of the state what became of this money. On the other hand, it was part of his contract with the county of San Diego that all fees paid to him from all sources be paid into the county treasury. The county paid him $450 as compensation for his services and in payment for the surrender of these fees and the salaries from the municipalities. The supervisor had authority to fix his salary and he agreed to these terms by accepting the office. There would be a partial failure of consideration if he were permitted to retain these fees. The county kept its part of the contract and petitioner should be held to his covenant. He cannot expect performance by the county and violate his obligations under his contract.

The case of City and County of San Francisco v. Mulcrevy, 15 Cal.App. 11, 113 P. 339, 341, is controlling here. Mulcrevy was county clerk of the city and county of San Francisco and ex officio clerk of the superior court. He collected fees in naturalization cases and laid claim to half of them under the same argument petitioner is making here. In holding that the fees must be paid into the treasury of the city and county of San Francisco it was said: "The charter having expressly provided a salary for the county clerk, and a salary for his many assistants, deputies, and copyists, states that such salary shall be 'full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county of San Francisco within twenty-four hours after receipt of the same.' The money came into the hands of Mulcrevy as such clerk, although the source from which it was derived and received was the amounts paid to him as fees in naturalization proceedings as prescribed and provided for in the act of Congress; and it was his duty to pay it into the treasury of the city and county. Language could not be more explicit. It does not admit of doubt or quibble as to its meaning. 'No matter from what source derived' means all the money coming into his hands by virtue of and by reason of his being such county clerk and ex officio clerk of the superior court. It was by reason of his election as county clerk and his taking office and giving his bond, and receiving a salary of $4,000 per annum, that he was enabled to receive the fees for naturalization proceedings in the superior court. He received them in his official capacity. He was ex officio clerk of the superior court in which the fees were collected under the provisions of the act of Congress. The act authorized him to retain one-half the fees collected by him; but as to what he was to do with such half so retained did not concern the United States government, but was a matter solely between himself and the city and county of San Francisco. It was his duty to receive and file complaints, answers, pleadings, petitions in probate, and to perform all services required of him, for which he received fees. It was his duty to perform all services required of him by the laws of the state at the time he took office, and all services that might be required of him by any subsequent law of the state enacted after his accession to office. Such fees were not his, but belonged to the city and county, he being in one sense the agent of the city and county in collecting such fees. It was equally his duty to perform services in naturalization proceedings after the passage of the law subsequently enacted by Congress, and to receive fees for such services, but the fees when so received belonged to the city and county of San Francisco. It was not for him to say that the services were performed under the authority of the United States, and not under the authority of the state."

A petition for hearing in the Supreme Court was denied and the case went to the Supreme Court of the United States. Mulcrevy v. City and County of San Francisco, 231 U.S. 669, 34 S.Ct. 260, 262, 58 L.Ed. 425. In upholding the decision of the District Court of Appeal the Supreme Court of the United States said:

"But it is contended by plaintiffs in error that the fees having been received officially is not of importance, that nevertheless he acted as the representative of the United

States, in execution of the policies of the United States, and being by the act of Congress invested with his powers, he is entitled for himself to the compensation prescribed by the act for their execution, without any liability to account for them to the city. The last proposition, however, does not follow from the others, and the others are but confusing. If it be granted that he was made an agent of the national government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was—not earning them otherwise or receiving them otherwise, but under compact with the city to pay them into the city treasury within twenty-four hours after their receipt.

"Under the contention of plaintiffs in error a rather curious situation is presented. Mulcrevy was elected to an office constituted by the municipality under the authority of the state. He was given a fixed salary of $4,000 with the express limitation that it should be his complete compensation. He agreed that all other moneys received by him officially should be paid into the treasury of the city. He was given office accommodations, clerks to assist him, and yet contends that notwithstanding such equipment and assistance, notwithstanding his compact, he may retain part of the revenues of his office as fees for his own personal use. We cannot yield to the contention."

See, also, County of Los Angeles v. Cline, 37 Cal.App. 607, 174 P. 73; Los Angeles County v. Cline, 185 Cal. 299, 197 P. 67; County of Alameda v. Cook, 32 Cal.App. 165, 162 P. 405.

To support his contention, petitioner relies upon the cases of Boss v. Lewis, 33 Cal.App. 792, 166 P. 843, and City of Sacramento v. Simmons, 66 Cal.App. 18, 225 P. 36.

The Boss Case is of no assistance to him. There was involved no provisions of a city or county charter. The court merely held that the state could require a county to pay fees of a local registrar of vital statistics out of the county treasury.

The Simmons Case involved the right of a city officer, acting as city health officer, to retain for his own use fees earned as local registrar of vital statistics. It turned on the construction put on provisions of the charter of Sacramento. The court was of the conclusion that "there was nothing in the city charter during the period involved in these proceedings or in the general laws of the state which required the defendant to turn over to the city treasurer of the city of Sacramento compensation collected by him from the county of Sacramento through the agency of the state of California for discharging the duties of local registrar of vital statistics for the state of California." In that respect the charter of Sacramento differed from the charter of San Diego county, which provided that all fees "collected for the performance of official duties or otherwise" be paid into the county treasury. This language is broad and all-inclusive. In order to support petitioner's position we would have to disregard the words "or otherwise," as contained in the charter provision. This we cannot do.

Respondents have demurred to the petition. As we have considered the case on its merits, the demurrer is overruled.

The peremptory writ of mandate is denied and the alternative writ is discharged.

We concur: BARNARD, P. J.; JENNINGS, J.

---

23 Cal.App.2d 15

COUCH et al. v. McGREGOR et al.

Civ. 5948.

District Court of Appeal, Third District, California.

Sept. 30, 1937.

Appeal and error 🔑95

Order denying motion of plaintiffs to strike out appearance and answer of one of the cross-defendants to cross-complaint was not appealable under statute (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

Appeal from Superior Court, Sierra County; Ragland Tuttle, Judge.

Action by Henry James Couch and another against N. E. McGregor and another, wherein the defendants and others filed cross-complaints making the plaintiffs and others cross-defendants. From an order denying plaintiffs' motion to strike out the appearance and answer of one of the cross-defendants, the plaintiffs appeal and motion is made to dismiss the appeal.

Appeal dismissed, and remittitur ordered issued.

Walter Gould Lincoln, of Los Angeles, for appellants.

Carlo Morbio and Carl A. Onkka, both of San Francisco, for respondents.

PER CURIAM.

This cause is before us upon a motion to dismiss the appeal taken by the plaintiffs from an order of the trial court denying the motion of plaintiffs to strike out the appearance and answer of cross-defendant Nevada Monarch Gold Mining Company, a corporation, to the cross-complaint filed in said action.

A reference to section 963 of the Code of Civil Procedure as amended by St.1933, p. 2472, shows that no appeal lies from the order referred to. See, also, the case of Couch et al., Plaintiffs v. McGregor et al., Defendants (Cal.App.) 66 P.(2d) 159, and the cases there cited.

It is ordered that the appeal referred to be and the same is hereby dismissed, and that the remittitur issue forthwith.

---

22 Cal.App.2d 673

PEOPLE v. DENTON.

Cr. 3003.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1937.

Hearing Denied by Supreme Court Oct. 28, 1937.

1. Criminal law ⇨1159(2)

Convictions would not be reversed because of weight given to testimony identifying defendant, where there was substantial evidence identifying defendant, since Court of Appeal will not concern itself with weight of evidence.

2. Witnesses ⇨321

In rape prosecution, trial court properly sustained objection to question put to prosecuting witness by defendant who had called her as his own witness, where defendant stated that question was asked solely for purpose of impeaching witness (Code Civ.Proc. § 2049).

3. Criminal law ⇨696(5)

In rape prosecution, trial court properly refused to strike from evidence a belt found by officer when taken to scene of attack by prosecuting witness on night of attack, where belt was admitted without objection, and officer testified that defendant was wearing an overcoat of the same fabric when arrested.

4. Contempt ⇨6

In rape prosecution, where trial court sustained objection to question put to prosecuting witness by district attorney on ground that question was leading and suggestive, court properly refused to cite district attorney for misconduct because of having asked question.

5. Kidnapping ⇨5

Evidence that defendant attempted to rob victim at corner, grabbed her on shoulder, and carried and dragged her along street to a dark place, and again attempted to rob her, taking off her shoes and stockings, looking for money, and beating her for not finding it, was sufficient to sustain conviction for kidnapping for purpose of robbery in addition to conviction for robbery.

6. Larceny ⇨40(9)

In prosecution for grand theft of automobile, variance between allegation in information that automobile belonged to certain person and evidence that owner had turned automobile over to that person and had permitted her to drive it was not fatal, since possession alone as against wrongdoer is a sufficient interest to justify allegation and proof of ownership in such a prosecution.

7. Criminal law ⇨1178

Alleged errors in admission of testimony in criminal prosecution would not be considered by appellate court in absence of argument or citation of authorities in support of contention.

8. Criminal law ⇨956(11), 957(1)

In criminal prosecution, trial court properly refused to admit jurors' affidavits, filed in support of motion for new trial, attempting to impeach their verdict, and hearsay evidence of statements made by jurors for purpose of impeaching verdict, since verdict could not be impeached by such evidence.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Hillard Denton was convicted of rape, kidnaping, kidnaping for the purpose of robbery, grand theft, assault, assault with a deadly weapon, and of robbery, and he appeals from the judgments and from an order denying a motion for new trial.

Affirmed.

Arthur C. Webb, of Los Angeles, and Robert A. Neeb, Jr., of Hollywood, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

Defendant was convicted under three counts of rape, one count of kidnaping, two counts of kidnaping for the purpose of robbery, one count of grand theft, one count of assault, two counts of assault with a deadly weapon, one count of robbery, and he admitted two prior convictions. Sentence was pronounced, and the appeal is from the judgments and the order denying a motion for a new trial.

[1] The first and primary contention of the defendant is that the evidence is insufficient to support the verdict as to each count and he takes the counts up in detail. His argument in this regard being that the defendant was not properly identified. There is positive and direct identification of the defendant as to each count. The defendant nowhere claims that there is not such evidence of identification, but confines his argument solely to the amount of weight to be given to such testimony, characterizing it as being in the opinion of counsel improbable and unlikely. It is sufficient for us to say that there is substantial evidence identifying the defendant as to each count. This court will not concern itself with its weight. People v. Young, 136 Cal.App. 699, 703, 29 P.(2d) 440; People v. McGill, 10 Cal.App.(2d) 155, 160, 51 P.(2d) 433; People v. Grider, 10 Cal.App.(2d) 287, 288, 51 P.(2d) 881; People v. Smith (Cal.App.) 70 P.(2d) 677.

[2] After the People had rested their case the defendant called Clara Lowe as his own witness and asked her a question regarding a statement made to her mother upon the question of identification of defendant, which question he stated was solely by way of her impeachment. The court sustained an objection thereto. The defendant contends that the court erred in sustaining such objection. In the case in chief the witness upon her direct examination on behalf of the People identified defendant as her assailant and she was cross-examined at length upon that subject. In the cross-examination, however, appellant failed completely to question the witness concerning whether or not she was able to identify defendant other than by his voice. Afterwards when the defendant used her as his own witness he sought to develop the fact that at the time she had reported this attack to her mother she had told her mother that she could not identify the defendant other than by his voice. Under this contention defendant cites a large number of cases to the effect that in cases of rape the defendant should be allowed a wide latitude upon cross-examination. These are entirely beside the point, for the defendant was allowed a wide latitude and was wholly unrestricted upon any material points in his cross-examination of the witness. These cases relate to the impeachment of the prosecution's witness upon cross-examination and are not applicable here where defendant sought to impeach his own witness. This situation is governed by section 2049 of the Code of Civil Procedure, which provides that a party may not impeach his own witness but that he may contradict such witness by other evidence. It is not permissible for one to call a witness in his own behalf and ask such witness a question solely for the purpose of impeaching such witness, which is what the defendant sought to do in the instant case. People v. Sliscovich, 193 Cal. 544, 553, 226 P. 611; People v. Jaggers, 120 Cal.App. 733, 8 P.(2d) 206.

[3] The defendant next complains that the court erred in refusing to strike from the evidence a belt which was found by one of the officers back of the church where one of the attacks had been committed. The prosecuting witness took the officers back there the night the incident occurred. The belt was admitted into evidence without objection on the part of the defendant. One of the officers testified that defendant was wearing an overcoat of the same fabric when arrested. The basis of the defendant's motion to strike the belt was that the prosecuting witness had failed to identify the belt. There is no merit in this contention. The defendant makes other contentions with reference to the admission of evidence which are without merit.

[4] The defendant next contends that there was prejudicial misconduct on the part of the district attorney. The assert-

ed misconduct lies entirely in what appellant claims to be leading and suggestive questions on the part of the district attorney. The record shows just one such question. It was to the witness Clara Lowe relative to her ability to identify an overcoat worn by the defendant. The question was, "But you have stated that you did not think this was the overcoat?" This was objected to as leading and suggestive and the court sustained the objection. Thereupon defendant's counsel asked that the district attorney be cited for misconduct, but the court refused to do so. The contention that the mere asking of a leading question is misconduct is far fetched. The authorities cited by the defendant do not sustain such a rule.

[5] The defendant next contends that as to count 5, which relates to the crime of kidnaping for the purpose of robbery, that the evidence shows the actual robbery, if any, took place at the corner of Thirty-Eighth and McKinley avenue at the time the defendant first accosted the prosecutrix, and that therefore the evidence sustains only a charge of robbery and not the charge which was stated of kidnaping for the purpose of robbery. The evidence shows that the defendant first attempted to rob his victim at Thirty-Eighth and McKinley, but it further shows that thereafter he grabbed his victim as tight as he could on the shoulder and carried and dragged her along to a dark place on Thirty-Seventh street. There he again attempted to rob her, taking off her shoes and stockings, looking for money, and beating his victim for not finding it. There is no merit in this contention. People v. Johnston, 140 Cal.App. 729, 733, 35 P.(2d) 1074; People v. Raucho, 8 Cal.App.(2d) 655, 664, 47 P.(2d) 1108.

The defendant next contends that the verdict was the result of passion and prejudice. But there is no merit in this contention.

[6] The defendant next contends that there was a variance between the information and the proof on count 4 charging grand theft. The information alleged the automobile was "the personal property of one Bettie Beard." The defendant contends that the evidence showed that the automobile was the property of Virgil Wilson. The evidence was to the effect that Virgil Wilson was the owner of the car and that on the particular day in question he had turned the car over to Bettie Beard and had given her permission to drive the same. There is no merit in this contention. "Possession alone, as against the wrongdoer, is a sufficient interest to justify an allegation and proof of ownership in a prosecution for larceny." People v. Kirsch, 204 Cal. 599, 602, 269 P. 447, 449; People v. Cloud, 100 Cal.App. 792, 281 P. 79; People v. Larrabee, 113 Cal.App. 745, 299 P. 85.

[7] Defendant next contends that the court erred in the admission of certain testimony, but he has not seen fit to advance any argument or cite any authorities in support of his contention, being content with a mere statement of the same, and we shall not pursue the subject farther.

The defendant next contends that the court erred with regard to several instructions. We have examined all of these contentions and find no merit in them.

[8] Finally, the defendant contends that the court erred in refusing to admit into the evidence certain affidavits which were filed in support of the motion for a new trial. The affidavits were by jurors attempting to impeach their own verdict and hearsay evidence of statements made by jurors for the purpose of impeaching the verdict. It has been held that it was proper for the trial court to refuse to allow such an affidavit to be filed. People v. Kloss, 115 Cal. 567, 578, 47 P. 459; People v. Smith, 206 Cal. 235, 273 P. 789; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Kennedy (Cal.App.) 69 P.(2d) 224. The verdict cannot be impeached by such evidence. People v. Washington, 113 Cal.App. 352, 355, 298 P. 121. There is nothing in these affidavits in any event which would warrant a reversal.

Judgments and order denying new trial affirmed.

We concur: WOOD, J.; McCOMB, J.

22 Cal.App.2d 618

BROOKS et al. v. JOHNSON et al.

Civ. 2035.

District Court of Appeal, Fourth District, California.

Sept. 23, 1937.

Hearing Denied by Supreme Court Nov. 22, 1937.

1. Automobiles ⇨242(6)

Liability of automobile dealer for accident occurring in Wyoming, and involving automobile which was being driven from factory as part of a convoy in charge of another, depended upon proof that such other was agent of dealer.

2. Master and servant ⇨330(1)

The burden of proving agency rests on party alleging it as respects master's liability for negligence of alleged agent.

3. Master and servant ⇨5

Elements to be considered in determining the status of a person as an employee or as an independent contractor are the right of control and the right of discharge.

4. Master and servant ⇨5

Where person for whom services are being performed has no right of complete control over person performing them or right to terminate services before completion, the person performing the services is generally regarded as an "independent contractor" and not an "employee."

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

5. Automobiles ⇨194(2)

Automobile dealer who engaged another to bring a number of automobiles by convoy from factory at a fixed price per automobile was not liable for collision of one of such automobiles, while passing through Wyoming, with automobile of another as result of negligence of driver who had been hired by such other, since latter was an "independent contractor" rather than an "employee," notwithstanding dealer selected the route to be followed and gave directions as to oiling of the automobiles.

6. Appeal and error ⇨419(1)

Where defendant had moved for judgment notwithstanding the verdict or for a new trial, a notice of appeal from judgment and from all orders made in connection therewith was too vague to properly bring the orders denying defendant's motion before the appellate court for review (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by James T. Brooks and others against M. Edward Johnson and another. Judgment for plaintiffs, and the named defendant appeals.

Reversed. Attempted appeal from orders dismissed.

Wright, Monroe, Thomas & Glenn, of San Diego, for appellant.

A. J. Getz, of Los Angeles (William J. Claassen, of Los Angeles, of counsel), for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiffs for damages resulting from a collision between an automobile owned and driven by James T. Brooks in which plaintiffs were riding and one owned by M. Edward Johnson and being driven by Harry Webber. The accident happened on July 8, 1935, on the Lincoln highway in the state of Wyoming. It is admitted that at the time of the accident Wyoming had no statute of similar import to section 1714¼ of our Civil Code, which has now become section 402 of the California Vehicle Code (St.1935, p. 153).

It is admitted that the evidence supports the implied finding of the jury that Webber was negligent in the operation of the automobile being driven by him; that his negligence was the proximate cause of the accident; that plaintiffs were not guilty of contributory negligence. The sole questions to be decided here are whether Webber was the agent, servant, or employee of Johnson or the servant or employee of Bert Vroom and Vroom's relation to Johnson.

The evidence on this question is brief. It consists solely of the testimony of the two defendants. Vroom was not a witness in the case.

Johnson's deposition was taken and used by plaintiffs under the provisions of section 2055 of the Code of Civil Procedure. He was also called as a witness in his own behalf. The same is true of Webber.

Johnson's evidence may be summarized as follows: On July 8, 1935, he was an automobile dealer in San Diego operating under the name of Johnson Motor Company, selling Hudson, Essex, and Terraplane cars.

Prior to that date he had purchased eight cars at the factory in Detroit and desired them driven to San Diego in a convoy. He engaged Bert Vroom to bring the automobiles to San Diego for $65 a car, Vroom to engage and pay the drivers and pay all expenses of the trip including gasoline and oil for the automobiles. The only arrangement made with Vroom as to the drivers was a request by Johnson that they be local San Diego men with families and that Vroom select capable drivers of reputable character. Johnson did not see or talk to any of the drivers about the trip, did not agree to pay them anything, and paid them nothing. Other than on this particular convoy, Vroom had never performed any services for Johnson. Johnson designated to Vroom the route he was to take and informed him where he could buy gasoline and oil at considerable saving, places having suitable camps, where other caravans had stopped before. Johnson directed Vroom as to when and where and how often to have the oil changed in the cars. Johnson had seen and talked with Webber concerning some political activities once before the trip and was informed by Vroom that Webber was to be one of the drivers. Johnson furnished an automobile in which Vroom and the other drivers traveled to Detroit. This automobile was returned with the convoy.

Webber's testimony may be summarized as follows: He was engaged by Vroom to drive in the convoy: "I paid all of my costs for the round trip. As to the nature of my agreement or arrangement with Mr. Vroom about compensation for bringing the cars in—well I tried at various times to get a set-up of the layout, and I never did get a definite idea as to what the set-up was. As a matter of fact, I don't know right now. Certain things were said relative to going and making this trip. He informed me that the company would pay the expenses and perhaps a nice little sum besides. Bert Vroom informed me of that. I think it was at his home one evening. I went out to see him. After the accident I returned to San Diego. I tried several times to get hold of Mr. Johnson but never did. I did not get to talk to him. * * * The understanding with Mr. Vroom was—there was nothing in writing—the understanding was that we boys, me included, were to receive our traveling expenses and a salary besides. He didn't stipulate as to how much. He did not say from whom. There was nothing particular said about that. We left San Diego to go to Detroit at the instance of Mr. Vroom to transport some cars and were to be paid in a certain manner for that. There was nothing said as to the amount particularly, and I am not positive as to whether it was stated whether this money was to come from Johnson Finance Company through Mr. Vroom, who was my boss, so-called, or whether it was to come from some other source. Such instructions as there were were communicated to me by Mr. Vroom. The only instructions were as to the time of leaving and the manner in which we were to handle the cars. Between the four of us we were to take our turns in driving and our expenses were to be paid by him; all those incidental things. I advanced by own expenses but it wasn't supposed to have been paid by me. It was not reimbursed. There was no other business to transact on this trip other than convoying these cars to San Diego."

[1, 2] Under the facts of this case it is necessary that the evidence establish that Vroom was acting as the authorized agent of Johnson in hiring Webber in order to render Johnson liable for Webber's negligence. Nofsinger v. Goldman, 122 Cal. 609, 55 P. 425; Ewing v. Hayward, 50 Cal.App. 708, 195 P. 970. The burden of proving agency rests on the party alleging it. This rule does not conflict with that announced in Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570, and other cases of similar import because those cases ground their conclusions on the construction of particular statutes not involved here.

[3, 4] Two important elements in determining the status of a person as an employee or as an independent contractor are the right of control and the right of discharge. Winther v. Industrial Acc. Comm., 16 Cal.App.(2d) 131, 60 P.(2d) 342; Bohanon v. James McClatchy Pub. Co., 16 Cal. App.(2d) 188, 60 P.(2d) 510; Hillen v. Industrial Acc. Comm., supra. If the person for whom the services are being performed has not the right of complete control over the person performing them and the right to terminate the services before completion, the relationship is very generally held to be that of independent contractor and not of employer and employee.

[5] It is obvious from the evidence we have outlined that Johnson did not reserve to himself the right to control the operations of the convoy. It is true that he selected the route it should follow. This is

nothing more than the right often exercised by a shipper of freight by rail to select the route over which his property is to be transported. The exercise of this right has never been held to constitute the common carrier the agent, servant, or employee of the shipper. The only other positive direction given by Johnson was as to the oiling of the automobiles. This direction indicated only an interest in the final result of the contract; that the automobiles arrive in San Diego in good condition and fit for sale. Winther v. Ind. Acc. Comm., supra. These two directions do not indicate that Johnson reserved to himself the right of complete control over the conduct of the convoy that is necessary to establish the relation of principal and agent or master and servant. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721; Barton v. Studebaker Corp. of America, 46 Cal.App. 707, 189 P. 1025. On the contrary, it affirmatively appears that the details of the conduct of the convoy from the time of the hiring of the drivers to the return to San Diego were in the exclusive control of Vroom. There is no intimation in the record that Johnson had any right to terminate the contract with Vroom before the cars were delivered in San Diego. He had no right of discharge. The contract was for the transportation of the cars from Detroit to San Diego for $65 per car, all expenses to be paid by Vroom. It follows that he was an independent contractor and not the agent, servant, or employee of Johnson.

As Vroom was an independent contractor and as Webber was working for him, Johnson was not liable for the negligence of Webber.

[6] Johnson has appealed from the judgment "and from all orders made in connection therewith." He moved in the alternative for judgment notwithstanding the verdict or for a new trial. The order denying a motion for judgment notwithstanding the verdict is appealable while the order denying the motion for new trial is not. Section 963, Code Civ.Proc. (as amended by St.1933, p. 2472). If it was the intention of Johnson to bring these orders before us for review we believe that the reference to them in his notice of appeal is too vague to properly effect that purpose. The attempted appeal from the orders is therefore dismissed.

Judgment reversed.

I concur: JENNINGS, Acting P. J.

---

23 Cal.App.2d 122

AGUIAR v. SOUDERS.

Civ. 5850.

District Court of Appeal, Third District, California.

Oct. 11, 1937.

1. Animals ⟹61

Laws authorizing summary seizure and sale of estray animals and all essential provisions thereof must be strictly construed, and substantial violation or omission of any essential part renders entire transaction void ab initio and may subject one wrongfully taking or holding animals to liability for resulting damages.

2. Animals ⟹63

The trial court's finding in action to replevy cows from city poundmaster's possession that plaintiff suffered no damages because of defendant's taking of cows, but that damages, "if any," accrued after they were impounded, and that, "if any damage was suffered," it was due to detention thereof pursuant to lawful taking, was not holding that cattle were damaged by their detention without properly feeding or watering them, but should be construed to mean that cattle suffered no damage in taking, impounding, or caring for them on appeal from judgment for defendant (Code Civ.Proc. § 510, subd. 2).

3. Appeal and error ⟹931(8)

The trial court's apparently inconsistent findings should be construed by appellate court so as to support judgment appealed from, if possible.

4. Animals ⟹61

One agreeing to feed and care for his own cattle while impounded cannot charge damages resulting from neglect in that regard to poundmaster (Code Civ.Proc. § 510, subd. 2).

5. Animals ⟹63

Evidence in action to replevy impounded cows and recover damages for wrongful detention thereof, without properly feeding, watering, and caring for them, that they were kept for two days in 75 by 100 feet corral containing water trough, into which water constantly flowed from pipe, and that ample hay was fed to them, sustained court's finding that they were not damaged (Code Civ.Proc. § 510, subd. 2).

6. Animals ⟹61

A poundmaster's failure properly to feed and water estray stock impounded by him does not invalidate entire transaction, so as to render his detention and holding of stock illegal, if he otherwise strictly followed statute (Code Civ.Proc. § 510, subd. 2).

7. Animals 🔑63

An owner of cows, legally impounded pursuant to city ordinance and in city poundmaster's lawful possession, cannot deprive latter of such possession by replevin or otherwise without first tendering or paying impounding fees.

8. Animals 🔑61

A lien on impounded animals for payment of poundmaster's fees may not be inferred in absence of statute specifically creating it (Civ.Code, § 2881).

9. Animals 🔑63

Whether city poundmaster is entitled to fee for impounding cattle need not be determined in mere possessory action of replevin to determine right to custody thereof (Civ. Code, § 2881).

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Manuel Aguiar against A. Souders, poundmaster of the City of Marysville. Judgment for defendant, and plaintiff appeals.

Modified, and affirmed as modified.

Ray Manwell and Ivan C. Sperbeck, both of Marysville, for appellant.

Rich, Weis & Carlin, of Marysville, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him in a suit to replevin 73 dairy cows from the possession of the poundmaster of Marysville. The court found that the cattle had been seized by the poundmaster and were subsequently taken by plaintiff from the lawful possession of that officer without payment of the impounding fees amounting to the sum of $149, which were then due, and that defendant was therefore entitled to the possession of the cattle, together with a lien thereon for the payment of said sum.

The plaintiff owns the 73 dairy cows which are involved in this suit. June 13, 1936, they were found grazing upon public land belonging to and within the limits of the city of Marysville, contrary to the provisions of an adopted ordinance of that city, numbered 246. Pursuant to the provisions of that ordinance, the defendant, who is the duly qualified poundmaster of Marysville, took possession of the cattle on June 13, 1936, and impounded them in a corral which is a part of the Marysville public pound. Verbal and written notices of the impounding of the cattle were immediately served upon the owner, pursuant to the provisions of the ordinance. The plaintiff was told that he could reclaim the stock upon payment of the impounding fees, which amounted to the sum of $149. On June 15th, a written notice was served upon the plaintiff that unless the cows were reclaimed by him on or before 10 o'clock a. m. of June 23, 1936, they would then be sold at the pound by the city at public auction. The cattle were not reclaimed, nor did the plaintiff offer to pay the impounding fees which were due.

June 15, 1936, this claim and delivery suit was commenced. The complaint alleges that plaintiff is the owner and entitled to possession of the cattle; that they were unlawfully seized by the defendant on June 13th and ever since have been wrongfully held by him to plaintiff's damage in the sum of $500. Upon filing the complaint under statutory proceedings, which we may assume were regular, the sheriff took the cattle from the possession of the poundmaster without tendering to him the impounding fees which were due thereon. The cattle were then placed in charge of a keeper, who delivered them to the plaintiff subject to his official custody. The answer sets up the adoption of public pound ordinance No. 246 of the city of Marysville, and avers that the defendant, acting as the duly qualified poundmaster of that city, found on June 13, 1936, plaintiff's 73 head of dairy cattle ranging and grazing on city property within the limits of Marysville, and took possession of the stock and impounded them in a corral which is a part of the public pound, promptly notifying the owner thereof, pursuant to the provisions of the ordinance, that, unless he reclaimed the cattle on or before 10 o'clock a. m. of June 23, 1934, they would be sold at public auction, but that the cattle were never reclaimed by the plaintiff, nor were the impounding fees paid; that the defendant as poundmaster of the city of Marysville is lawfully entitled to possession of the cattle pursuant to the provisions of the city pound ordinance; and that the plaintiff was not damaged in the sum of $500 or at all on account of the impounding or detention of the cattle.

Upon trial the court found the material allegations of the answer to be true; that the plaintiff is the owner of the 73 head of dairy cows; that pound ordinance No. 246 was duly adopted by the city of Marysville; that the defendant is the qualified poundmaster of that city; that on June 13, 1936, the defendant found said cattle running at large upon the streets and public lands belonging to and within the limits of the city of Marysville, and that, pursuant to the ordinance, as such poundmaster he did then take the cattle into custody and impound them in a corral belonging to the city public pound, where they were "provided with sufficient food and water"; that he forthwith served the owner with written notice of the impounding of the animals and of the time and place where they would be sold at public auction if they were not previously reclaimed; that the cattle were not reclaimed by the owner nor were the impounding fees paid by him; "that it is not true that plaintiff suffered damages in the sum of Five Hundred ($500) Dollars or in any other sum, or at all, by reason of the taking of said livestock by the defendant"; that on June 15th the sheriff of Yuba county, pursuant to process which was issued in this claim and delivery case, took possession of the stock from the poundmaster and delivered them to the plaintiff; that the plaintiff owes the sum of $149 as impounding fees on said stock; and that the defendant as poundmaster is therefore entitled to possession of the cattle together with a lien thereon to secure the payment of said fees. Judgment was entered accordingly. From that judgment the plaintiff has appealed.

The appellant practically concedes that his cattle were grazing on the property of the city of Marysville within its boundaries and that they were lawfully taken by the poundmaster and impounded pursuant to the provisions of ordinance No. 246. But it is asserted the cattle were thereafter "wrongfully detained by the defendant" contrary to section 510, subdivision 2, of the Code of Civil Procedure, by failing and neglecting to properly feed, water, or care for the stock, and by placing them in too small an inclosure to their great damage. It is also contended this wrongful detaining of the stock without proper care was contrary to the provisions of article VII, section 6, of the ordinance, and that the taking and impounding of the cattle was therefore unlawful and void ab initio, entitling plaintiff to the absolute right of possession thereof. The section of the ordinance last mentioned upon which the plaintiff relies reads as follows: "The poundkeeper shall cause all animals impounded to be provided with sufficient food and water suitable for such animals. Said food and water suitable for such animals shall be supplied at the expense of the City of Marysville. Should the poundkeeper neglect to so feed and water the animals impounded, he shall be liable to the owner for all damages arising therefrom."

[1-4] It is true, as the text in 2 American Jurisprudence, p. 801, § 149, declares, that laws authorizing the summary seizure and sale of estray animals, and all essential provisions thereof, must be strictly construed, and that a substantial violation or omission of any essential part thereof will render the entire transaction void ab initio, and may make one who wrongfully takes or holds such animals contrary to law liable for any damages which may be incurred on that account. But the court found in that regard: "That it is not true that plaintiff suffered damages in the sum of Five Hundred ($500.00) Dollars or in any other sum, or at all, by reason of the taking of said livestock by defendant, but that the damages, if any, suffered by plaintiff accrued subsequent to said animals being lawfully driven to the city pound and if any damage was suffered the same was due to the detention thereof pursuant to the lawful taking as aforesaid."

It is contended this finding, in effect, determines that, while the cattle were not damaged in taking or impounding them, they were damaged by the manner in which they were detained, to wit, by failing to properly feed and water them, and that the evidence does not support a finding that the stock were not damaged either in taking or in the manner of detaining them.

We do not construe the foregoing finding to hold that the cattle were in fact damaged by the manner in which they were detained, to wit, by negligence in failing to properly feed or water them. In accordance with the well-established rule of reconciling apparently inconsistent findings in favor of supporting the judgment, if possible, we are of the opinion we should construe this finding to mean that the plaintiff's cattle suffered no damage either in taking, impounding, or caring for them. The court does not find that they were damaged by the manner in which they were cared for or kept in the corral. The court says "if any damage was suffered" it was due to the detention thereof. This is not a finding that damages actually occurred. Moreover, there is substantial evidence that the plaintiff agreed with the defendant to feed and care for his own cattle while they were impounded. If the cattle were neglected in that regard, the plaintiff, under such circumstances, could not charge the damages which resulted therefrom to the defendant, for he assumed the responsibility of properly feeding and caring for the stock himself. The defendant testified in that regard: "He (Manuel Augiar) said that he would milk and feed his own cattle; take care of his cattle himself."

Mr. La Fortune corroborated that statement by testifying that the plaintiff said he "would milk and feed them."

[5] We are of the opinion the evidence sustains the finding that the cattle were not in fact damaged. It appears the 73 head of cattle were placed in the pound corral which is an inclosure 75 by 100 feet in size; they were kept there only two days; a water trough consisting of one-half of an oil barrel, cut through lengthwise, was placed within the inclosure, into which water from a water pipe constantly flowed; this water trough sometimes overflowed. There is evidence indicating that the cattle did not suffer for lack of water. It also appears that ample hay was fed to them through the boards or pickets about the inclosure. Substantial evidence indicates the cattle did not suffer for lack of hay or water. Under such circumstances it is not probable they would suffer in two days' time from a mere reduction of the quantity of hay and water. It is true that there is evidence that the plaintiff suffered a decrease of 50 or 60 gallons of milk a day for five or six days thereafter, and that two cows from the herd gave premature birth to calves which did not survive. But in support of the judgment it may be reasonably assumed there is insufficient evidence to show that this loss was due to any negligence on the part of the poundmaster or because of the inadequate conditions under which the cattle were impounded.

[6] We are of the opinion the failure on the part of a poundmaster to properly feed and water estray stock which he has impounded does not invalidate the entire transaction so as to render his detention and holding of the stock illegal, provided he has otherwise strictly followed the statute in that regard, although such neglect would make him liable for any damages to the stock resulting therefrom. It will be observed that is exactly what article VII, section 6, of the ordinances of Marysville, provides. After stating that the impounded stock must be provided with proper food and water, the ordinance declares: "Should the poundkeeper neglect to so feed and water the animal impounded, he shall be liable to the owner for all damages arising therefrom."

The court specifically found that: "While said animals were in the possession of said defendant as poundkeeper, all of said animals were provided with sufficient food and water suitable for such animals."

There is substantial evidence to support this finding. It follows that the finding to the effect that the plaintiff's cattle were not damaged in taking, impounding, or detaining them is adequately supported by the evidence. The findings also support the judgment which determines that the defendant was lawfully in possession and entitled to hold the cattle until they were reclaimed by the owner by paying the impounding fees which were due thereon, or until they were otherwise disposed of pursuant to law.

[7] Under the circumstances of this case plaintiff is not entitled to retain possession of the stock for the reason that he failed to tender or pay the impounding fees which are due thereon. Since the cattle were legally impounded pursuant to the provisions of ordinance No. 246, and in the lawful possession of the poundmaster, the plaintiff was not authorized, by means of replevin or otherwise, to deprive the officer of possession of the animals without first tendering or paying the impounding fees which were due. In 3 Corpus Juris p. 186, § 645, it is said in

that regard: "To test the legality of an impounding the owner of the animals may bring replevin for them, and is sometimes especially authorized by statute to do so. Where the impounding is legal, a demand and tender of lawful charges is necessary before replevin will lie."

It has been held the owner of animals may not recover possession of them from a poundmaster who has lawfully impounded them, by means of replevin or otherwise, until he has either tendered or paid the impounding fees which are lawfully due thereon. Wilhelm v. Scott, 14 Ind. App. 275, 40 N.E. 537, 42 N.E. 827; Ketchum v. Johnson, 181 Ark. 596, 26 S.W. (2d) 902.

The cases of Spect v. Arnold, 52 Cal. 455, and Thompson v. Corpstein, 52 Cal. 653, relied upon by the appellant, are not in conflict with what we have previously said regarding the necessity of tendering or paying lawful impounding fees as a prerequisite to the owner's right of possession from a poundmaster who has lawfully impounded animals. Both of these cases were reversed on appeal for lack of evidence to show that the animals were running at large when they were seized and impounded. In both of these cases the animals were unlawfully seized and impounded. In the present case the cattle were lawfully seized and impounded because they were found herded and grazing on property belonging to and within the limits of the city of Marysville, contrary to the express provisions of article VII, section 3, of the ordinances of Marysville, as amended by ordinance No. 246.

[8, 9] Finally, it is contended the court wrongfully imposed a lien on the cattle for the payment of the impounding fees, since the defendant neither pleaded nor proved the existence of a lien for the payment of his fees. Statutes and ordinances often specifically create liens to secure the payment of poundmasters' fees. 3 C.J.S. Animals, p. 1360, § 265. In the present case no such lien was specifically created by the ordinance. The claim of a lien on the cattle was neither pleaded nor proved. A lien is created either by contract or by operation of law. Section 2881, Civ.Code. It may be said the law implies a lien upon impounded animals to secure the payment of lawful fees due to the officer. We are of the impression that in the absence of a statute specifically creating the lien it may not be inferred. It is, however, not necessary to determine this question. This is a mere possessory action to determine the right to the custody of the cattle. The judgment awards the right of possession to the defendant. It was not necessary to vest a lien in favor of the defendant for the payment of the fees. He is entitled to the possession of the stock, and the only way in which they may be reclaimed by the owner is to pay the lawful fees incident to their impoundment.

The judgment is modified by striking out the provision creating a lien upon the cattle. As so modified, the judgment is affirmed. The respondent may recover costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.

22 Cal.App.2d 664

PEOPLE v. NIELSON.

Cr. 1571.

District Court of Appeal, Third District, California.

Sept. 27, 1937.

Criminal law 🔑511(3)

Where only testimony tending to connect defendant with offense of feloniously taking down an electric wire was given by an accomplice, evidence that on following day defendant had muddy shoes and moist trouser legs and was with a short, stocky man was insufficient corroboration to sustain conviction of offense (Pen.Code, §§ 593, 1111).

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Clifford Nielson was convicted of unlawfully, maliciously, and feloniously taking down an electric line, and he appeals. Reversed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff was tried jointly with three of the defendants, to wit, Clifford Hutchinson, W. H. Hutchinson and Reuben Smick, upon an information charging the violation of section 593 of the Penal Code, in that, on or about the 7th day of April, 1937, in the county of Sutter, said defendants did then and there unlawfully, maliciously, and feloniously take down, remove, and transfer a line erected and maintained by the Pacific Gas & Electric Company, etc. All of the defendants were convicted, and, from the judgment of conviction, Clifford Nielson appeals.

Upon this appeal it is urged that no evidence was introduced sufficient to justify the verdict of the jury, or to justify the jury in coming to the conclusion that the defendant had knowledge of, participated in, or aided or abetted in the commission of the offense charged in the information. This contention appears to be well taken. There is absolutely no testimony in the record, other than extrajudicial statements made by other defendants, that the appellant was present, or had anything to do with the commission of the alleged offense. These statements were not allowed to be admitted in evidence against the defendant, as they were not made in his presence and in which he did not participate, save and except the testimony of one of the defendants, Reuben Smick, whose testimony falls under the "Accomplice Rule" set forth in section 1111 of the Penal Code, to wit: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

A number of witnesses were introduced, and our attention has been called to all of them by counsel for the People, but in no single instance did the testimony of any one of the witnesses for the prosecution, other than as stated hereafter, tend in anywise to connect the appellant with the commission of the offense. All of the witnesses testified that on the night of April 7, 1937, a number of men were in the neighborhood of where the wires belonging to the Pacific Gas & Electric Company had been cut down and rolled up in coils. None of the defendants, at the scene just referred to, were seen or identified by any of the officers. We need not detail the testimony of the officers, but a careful reading of the whole transcript shows that our summary is sufficient. Their testimony went to the description of what they found, and of their own movements. The testimony as to the defendant Nielson is simply that on the next day he was arrested at the town of Lincoln; that his shoes were somewhat muddy and his pants legs somewhat moist.

A witness by the name of Covington testified that on the morning of the 7th day of April, 1937, he saw the defendant on a public highway about four miles west of the town of Lincoln; that he was walking in an easterly direction; that the clothing of the defendant looked badly bedraggled; that the defendant was with another young fellow whose clothing looked as though he had been lying in a coal car. "I did not notice their clothing; they looked tired; the other man was of short build, stocky, and he wore a cap at the time, and had on clothing that I would say had been washed a good deal, just as blue clothing, when it is washed a good deal, will fade out; he was distinctly dirty as though he had been riding in a coal car." The transcript does not show that this witness identified the other man who was with the appellant as one of the defendants in this case.

The testimony of the accomplice, Reuben Smick, shows the following: That the four defendants, on the 6th day of April, 1937, left for the scene where the electric wires were cut; that the four defendants and one Irene Haverty rode in a Buick sedan; that when they reached the place where the wires were cut the defendants Hutchinson and Nielson got out of the car; that Smick and Irene Haverty drove on about one mile, where they parked the car; that Smick went back to where the other defendants had gotten out of the car, and found them standing along the side of the road smoking; that he did not see any one cut the wires; that pretty soon a car came along with a flashlight, and they all hid until the car had gone by, when they scattered; that he, with the appellant, went to the town of Lincoln, where they were arrested.

The testimony of Reuben Smick, under the provisions of section 1111 of the Penal Code, is of course not sufficient to uphold the conviction, and outside of his testimony there is not a scintilla of evidence connecting the appellant with the commission of the alleged offense. The fact that he had muddy shoes and soiled trousers is not sufficient, and the fact that he was in company the next day with a man described as "short, stocky", etc., by the witness Covington, does not support the verdict of the jury. Two of the defendants made statements which implicated themselves, and a third, so far as we are advised, has not appealed.

Citation of authorities seems unnecessary. However, we will refer to two cases, that of People v. Parkinson, 81 Cal.App. 618, 254 P. 612, and People v. Haack, 86 Cal.App. 390, 260 P. 913, where convictions were had upon the testimony of accomplices, uncorroborated, and in which, also, we may add, erroneous instructions in relation to their testimony were considered.

It would serve no useful purpose to extend the length of this opinion, for the simple reason that a reading of the entire transcript disclosed no testimony other than what we have referred to, and which utterly fails to connect the appellant with the commission of the offense, or to justify a jury in finding that the appellant was guilty as charged beyond a reasonable doubt.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

SYLER v. KATZER.*

Civ. 5753.

District Court of Appeal, Third District, California.

Sept. 29, 1937.

Hearing Granted by Supreme Court Nov. 22, 1937.

Limitation of actions 🔑177(2)

An action to recover from executor for services allegedly performed by plaintiff for testator during his lifetime from January 1, 1930, to and including August 15, 1935, was barred by limitation where there was no allegation of a promise to pay at termination of services or any other allegation that would take claim out of bar of statute, since presumption was that hiring was from month to month, and hence two-year statute applied (Code Civ.Proc. § 339, subd. 1, and § 337, subd. 2, as amended by St.1933, p. 2116).

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Action by M. R. Syler against Hermann E. Katzer, as executor of the estate of Hermann G. Halkett, also known as H. G. Halkett, deceased. From a judgment for plaintiff and from an order denying his motion for a new trial, defendant appeals.

Reversed and remanded.

Charles L. King, of Gridley, for appellant.

T. F. Peterson, of Crescent City, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was brought against defendant, as executor, for services alleged to have been performed by plaintiff for the deceased during his lifetime. The court, sitting without a jury, awarded judgment for the plaintiff, and, after a denial of the motion for a new trial, this appeal is brought from the judgment and order.

Within the time allowed by law plaintiff verified and presented a claim against the estate of Hermann E. Katzer by filing the same with the county clerk. The claim not having been approved within ten days by the executor, the plaintiff elected to deem such failure to act upon the claim as a rejection thereof, and brought this action upon such rejected claim. The claim so filed was in the following words and figures:

"For services in caring for deceased during his period of illness, consisting of taking care of all business affairs, cooking and carrying meals to said deceased, daily delivery of mail, and transporting to and from places desired by deceased, and making all arrangements for medical and hospital care.

"1930—12 months at $50.00 per month........	$ 600.00
1931—12 months at $50.00 per month........	600.00
1932—12 months at $50.00 per month........	600.00
1933—12 months at $50.00 per month........	600.00
1934—month of January.....................	50.00
Feb. to Dec.—11 months at $20.00 per month	220.00
1935—Jan. 1 to Aug. 15, 7½ months at $20.00 per month	150.00
Interest on above account at 6 per cent per annum	156.93
	$2976.93"

---

*For subsequent opinion see 84 P.2d 137.

Plaintiff, suing upon this claim, relied, at the trial, upon his second and third causes of action. The second cause of action alleged a continuing contract for the period beginning January 1, 1930, and ending at the date of death, August 15, 1935, and that decedent promised to devise to plaintiff all of his estate or in lieu thereof to devise to plaintiff a sum equal to the reasonable value of plaintiff's services.

The third cause of action alleged services performed during the period set forth in the claim of the value of $2,820, and that decedent promised and agreed to pay the plaintiff upon termination of said services or upon demand.

The answer filed to this complaint denied the material allegations of the causes of action, and in addition pleaded the statute of limitations and the statute of frauds.

The court, sitting without a jury, found that the decedent requested plaintiff to render such services to him as he might require continuously for the remainder of the life of decedent, and agreed to pay therefor by giving and devising to him all of his estate, or in default thereof that he would devise and bequeath the plaintiff a sum for the reasonable value of plaintiff's services, and that, pursuant to said request and agreement, plaintiff rendered personal services and performed labor for decedent continuously from the 1st of January, 1930, to and including the 15th day of August, 1935.

The court further found that Halkett at the time of his death failed and neglected to give or devise to plaintiff all or any part of his estate nor to give to plaintiff a sum equal to the reasonable value of his services, nor any sum whatsoever, and found that the reasonable value of such services rendered by plaintiff to decedent was in the sum of $2,820, and ordered judgment therefor.

The court also found in favor of the allegations in plaintiff's complaint to the effect that the said decedent, during his lifetime, became indebted to plaintiff in the sum of $2,820 for work and labor performed and services rendered to decedent at his special instance and request, which services were agreed to be, and which were in fact, continuous from the 1st day of January, 1930, to and includng the 15th day of August, 1935, and agreed to pay the plaintiff at the termination of said services or upon demand.

As grounds for reversal appellant contends the court erred in permitting evidence as to services performed more than two years prior to the death, claiming the same was barred by section 339, subdivision 1, and section 337, subdivision 2, of the Code of Civil Procedure, as amended by St. 1933, p. 2116; and relies upon the case of Etchas v. Orena, 127 Cal. 588, 60 P. 45, 46. The creditor's claim in Etchas v. Orena, supra, read as follows:

"To services rendered deceased at her request by claimant as companion, and as servant doing household work, cooking, sewing, and nursing, from June 1, 1885, to June, 1895, six months in each and every year aforesaid, at $30 a month....	$1,800.00
And for six months of each and every year aforesaid, for services in taking care of house and property of decedent, at her request, in her absence at the rate of $5 a month........................	300.00
	$2,100.00"

In considering the claim the court there said:

"No contract is set forth as to when the wages were to be paid, and in such case the presumption is that the hiring was by the month. Civ.Code, §§ 2010, 2011.

"It appears, therefore, on the face of the claim as presented, that all that part of it was barred by the statute except for services that became due on or after January 19, 1894. If barred by the statute of limitations, the claim could not be allowed by the executor or the judge. Code Civ.Proc., § 1499. * * *

"The claim, as presented and passed upon by the executor, was the foundation of the plaintiff's cause of action. She could not come into court and allege and prove any other or different cause of action from that stated in the claim. The executor was entitled to have the claim presented in sufficiently intelligent form to enable him to pass upon it legally."

In the Estate of Steuer, Deceased, 77 Cal. App. 584, 247 P. 211, the court, in considering a claim general in character as here involved, held that the claim showed upon its face to be a monthly charge for services rendered, and that portion of the claim covering services rendered beyond the two-year limitation of the statute was barred.

Respondent relies upon the case of Warder v. Hutchison, 69 Cal.App. 291, 231 P. 563, and contends under the case as stated by him he might prove either an express or implied contract and could not be compelled to elect on which count he relied.

Examination of that case shows, however, that the claim as filed against the estate was full and complete. In part it read as follows:

"For board, lodging, washing, improvements, etc., $2000.00, based upon the following:

"On or about December 15, 1907, the above named deceased, David H. Hutchison, and W. R. Warder and Vinnie Warder, his wife, these claimants, entered into an oral agreement by which said David H. Hutchison agreed that in consideration of board, lodging, and washing to be furnished to and done for him by these claimants, and to make his home with said claimants during the lifetime of said David H. Hutchison, he, said David H. Hutchison, would convey to these claimants, that certain property near Oleta, Amador County, California, known as the 'Hutchison Ranch', and particularly described as follows, to-wit: (Here follows a particular description of the land). That in pursuance of said agreement and not otherwise, said deceased made his home with these claimants upon said premises and these claimants there furnished said deceased with said board and lodging and washing continuously from on or about December 15, 1907 to February 22, 1923, on which last mentioned date the said David H. Hutchison died intestate."

The court there stated that there was no material variance between the claim presented to the administrator and the cause of action stated in the complaint, and that the claim itself set forth sufficient facts upon it to base either an action on the contract or one for the reasonable value of services performed.

Nowhere in the creditor's claim before us is there alleged a promise to pay at the termination of the services or any other allegation that will take the claim out of the bar of the statute of limitations. The presumption is the hiring was from month to month and therefore the two-year statute of limitations would apply.

The case of McGrath v. Carroll, 110 Cal. 79, 42 P. 466, 468, is quite similar to the case at bar. There the claim merely set forth certain items of moneys advanced to deceased from December, 1879, to September, 1882. The claim was rejected. By the complaint plaintiff set up money that was received and held by decedent "in trust for the use and benefit of plaintiff."

Defendant, by demurrer and answer, pleaded the statute of limitations. The court said:

"No action can be brought by the holder of such a claim unless it be first presented (Code Civ.Proc., §§ 1493, 1500), and every claim must sufficiently indicate the nature and amount of the demand, to enable the executor and judge in probate to act advisedly upon it. Henderson v. Ilsley, 11 Smedes & M. [(Miss.) 9], 11 [49 Am. Dec. 41]. As no holder of a claim may maintain an action upon it unless it has first been presented, it follows as a necessary sequence that the only action the holder may maintain is one founded upon the claim presented. Lichtenberg v. McGlynn, 105 Cal. 45, 38 P. 541.

"In this case the claim presented was a simple demand for money lent, accompanied by a demand for legal interest, with which such moneys are charged. No hint or suggestion is made of a trust, and the debts set out were all long barred by the statute of limitations. Upon such a claim the executors had no discretion. Their plain duty was to reject it as they did. Code Civ.Proc., § 1499.

"In the complaint for the first time there is a plea of trust (without disclosure of its terms even then), and the defendant executors are compelled to meet a cause of action unsupported by the claim presented, and a claim founded thereon which had never been presented, and upon which they had never been called to pass.

"They did this by pleading the statute of limitations, which was a good plea directed against the rejected claim that plaintiff was compelled to set forth in his complaint. They might also have pleaded the variance and nonpresentation in abatement, but, under the circumstances, we are of the opinion that the point is sufficiently presented by the plea of the statute, and this seems to have been in the mind of the court when it said: 'Treated as a simple money demand, it would clearly be barred on its face, inasmuch as the party did not commence a suit while Carroll was alive, but until after his death. * * * You have presented a demand and claim against the estate, and that makes your cause of action.'"

It is claimed the evidence adduced in support of the allegations of the complaint based upon this claim fails to substantiate the allegations of the complaint, and that the evidence is insufficient to support the findings of fact, but, in view of the fact that here the claim as filed establishes its own invalidity, we need not discuss this point.

The judgment is therefore reversed, and the cause remanded.

We concur: THOMPSON, J.; PLUMMER, J.

22 Cal.App.2d 623

NOBEL et al. v. YOU BET MINING CO. et al.

Civ. 5804.

District Court of Appeal, Third District, California.

Sept. 23, 1937.

1. Quieting title ⇨10(4)

Defendants claiming title to mineral lot by adverse possession failed to show conclusively that requirements to perfect title had been met and were not entitled to decree quieting title, where no claim was made that defendants' title was founded on any written instrument, judgment, or decree, and there was no showing that defendants or any of their predecessors in interest had occupied and claimed lot for five years continuously, or that any taxes had ever been paid on lot.

2. Quieting title ⇨10(1), 44(4)

Defendants claiming title to mineral lot by adverse possession could not predicate their title upon weakness of another's claim of title, but defendants were required to show clearly and conclusively that all requirements to perfect title by adverse possession had been met before decree quieting title on that ground could be entered.

3. Quieting title ⇨47(2)

Where defendants claiming title to mineral lot relied entirely upon their adverse possession and by stipulation waived any claim under a deed to lot, it was unnecessary for trial court to make any finding with reference to defendants' purported title through deed.

4. Mines and minerals ⇨60

Where defendants claiming title to mineral lot by adverse possession failed to establish their claim, a purported sublease executed to owners of lot by defendants was void, and owners did not hold title in trust for defendants.

5. New trial ⇨½

The purpose of statute permitting trial court to reopen case for further proceedings was to afford to trial court, sitting without a jury, the right to correct any issue, finding, or judgment that it may have made in original proceeding (Code Civ.Proc. § 662).

6. New trial ⇨9

Where sole issue in original trial was question of defendants' title to mineral lot by adverse possession, and trial court, sitting without a jury, entered findings and judgment quieting defendants' title to lot, court had right, on plaintiffs' motion for a new trial, to vacate findings and judgment and to order further proceedings on the limited issue so that any mistake previously made might be corrected (Code Civ.Proc. § 662).

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by R. E. Nobel and others against the You Bet Mining Company and others, wherein defendants filed a cross-complaint. From a judgment for plaintiffs, defendants appeal.

Judgment modified and, as modified, affirmed.

Nilon, Hennessy & Kelly, of Grass Valley, and W. E. Wright, of Nevada City, for appellants.

P. H. Johnson and C. K. Curtright, both of Sacramento, for respondents.

MAXEY, Justice pro tem., delivered the opinion of the court.

The amended complaint alleges that the plaintiffs and their predecessors in interest, on February 7, 1930, located and claimed as a placer mining claim certain lands described as the north half of section 30, township 16 north, range 10 east, M. D. B. & M. (excepting certain mining claims and locations therein particularly specified) located in the county of Nevada, state of California; that the plaintiffs now have a right to the exclusive possession of such property; that the defendant You Bet Mining Company entered on said mining claim and property in 1933, and has asserted some claim or right to the possession of a portion of the mining claim above set forth, and that it is now mining and conducting other operations in connection with said mining venture upon the claim of the plaintiffs herein. The plaintiffs seek to enjoin the said defendants from occupying said premises and from conducting any mining or other operations thereon, together with the usual and general prayer for relief.

The defendants answered to the amended complaint, denying that the plaintiffs or their predecessors in interest ever took possession of said property or that they are now in possession of said property, admit that they (the defendants) are in possession of said property and claim title thereto by adverse possession. The defendants further affirmatively plead that L. W. Simpson and Jennie A. Simpson, in conjunction with some of the plaintiffs, attempted to locate and claim as a placer mine a certain portion of the property set forth in the plaintiffs' amended complaint and that the defendants are the successors in interest of the said L. W. Simpson and Jennie A. Simpson by virtue of a deed made by the Simpsons to the defendants herein subsequent to the filing of the original complaint herein but prior to the filing of the answer. The defendants at the time of answering filed a cross-complaint against said plaintiffs, alleging that the plaintiffs and cross-defendants entered upon said lands and premises as the sublessee of the You Bet Mining Company, one of the defendants herein, and that any title acquired by the plaintiffs and cross-defendants by virtue of the location and claim of the placer mine specified in the complaint inures to the benefit of the defendant corporation You Bet Mining Company, and that the plaintiffs and cross-defendants hold said property in trust for the said corporation. The said defendant You Bet Mining Company claims title to and right to the possession of the mining property involved herein. The defendant You Bet Mining Company, by said cross-complaint, seeks to have its right in and to the property adjudged and its title thereto quieted, and, as an alternative thereto, should the court find that the location and claim of the property involved is vested in the plaintiffs and cross-defendants, that it be declared that they hold such property in trust for the use and benefit of the defendant and cross-complainant You Bet Mining Company, and further seeking to quiet the title of the said defendant and cross-complainant in and to certain ditches that traversed the property involved herein.

For the purpose of clarity, the plaintiffs and cross-defendants herein will hereinafter be referred to as respondents, and the defendants and cross-complainants will be referred to as appellants.

The cause was tried before the court without a jury. At the outset of the trial it was stipulated between counsel that the cause should be tried upon the cross-complaint alone upon the theory of a quiet title action, with the burden of proof upon the appellants here and a determination had as to the rights of the respective parties to the possession of the property in question. It was further stipulated that the only property involved is mineral lot No. 80, which is a mining claim situated and located on the property described in the amended complaint and as hereinbefore described, and that all other parcels or portions of said described property should be excluded from the court's consideration in this action.

During the trial of the case, at the first hearing, the attorney for appellants stated to the court that their title and consequent right of possession in and to mineral lot 80 depended entirely upon their adverse possession of this lot.

The trial proceeded upon the stipulations and statement of counsel as above set forth.

The trial court found in favor of appellants and entered its findings and judgment quieting appellants' title to mineral lot 80; the respondents moved for a new trial and thereupon the court entered its order setting aside and vacating the findings and judgment and further ordering "that the case be reopened for further proceedings upon the sole issue of adverse possession and that each party introduce and give all his or its evidence bearing upon or relating to said issue."

A further hearing was had before the court at which time the sole question presented to the court was that of the adverse possession of the appellants herein, and upon the conclusion of the testimony the court made and filed its findings and judgment to the effect that appellants had no title nor right to the possession of the property described in the amended complaint; that the plaintiffs were on the 7th day of September, 1930, and ever since have been and now are the owners, in possession, and entitled to the possession of the property described in the amended complaint, subject to certain ditch easements particularly specified in said judgment and findings; and that the appellants be forever debarred, restrained, and enjoined from asserting or claiming any right, title, interest, or claim whatever in or to said property adverse to the plaintiffs.

Respondents admit that the description of the property contained in the findings and in the judgment is incorrect and that said findings and said judgment, under the stipulation of counsel, should be limited to mineral lot 80, which is a part and portion of the real property described in the findings and judgment. It will therefore be necessary to amend the findings and judgment in this particular.

The questions raised by appellants upon this appeal may be summarized under three general headings: First, the insufficiency of the evidence to justify the findings and judgment and that such findings and judgment are contrary to law; second, error of the court in its order for "further proceedings" pursuant to section 662 of the Code of Civil Procedure and in conducting said "further proceedings"; third, the court's failure to find on all issues.

[1, 2] The sole and only question presented to the trial court, under the stipulation of counsel, was as to whether or not the appellants had acquired any title or right of possession in mineral lot 80 by reason of their adverse possession of that property. A careful study of the evidence admitted and of the transcript of the testimony justifies the conclusion reached by the trial court. The appellants claim title dating back to 1874 and by and through various persons from that time down to the present time as shown by the chain of title introduced as evidence in this case. No claim is made that appellants' title is founded upon any written instrument, judgment, or decree, and the record is entirely silent regarding appellants or any of their predecessors in interest having occupied and claimed mineral lot 80 for a period of five years continuously, nor is there any testimony or showing of any kind that any taxes have ever been paid upon these premises.

Whatever title appellants had or have to this property must depend entirely upon the strength of such title as shown by the evidence in the case; it cannot be predicated upon the weakness of another's claim of title; being predicated upon the claim of adverse possession by the appellants, it is incumbent upon appellants to show clearly and conclusively that all of the requirements to perfect a title by adverse possession have been met before a decree quieting title upon such a ground can be entered. There is an entire lack of such a showing in the instant case.

[3] Appellants have pleaded and there is evidence indicating that a deed was given to appellants by the Simpsons to mineral lot 80. The appellants have, however by the stipulation hereinbefore referred to, waived any claim whatsoever that they might have under or by virtue of this deed, relying entirely upon their adverse possession to this lot. It was therefore unnecessary for the court to make any finding with reference to the title or purported title of appellants by or through the Simpson deed.

[4] Appellants' further contention that respondents were holding this lot in trust for appellants by reason of respondents being sublessees of appellants, and, therefore, any title acquired by them inured to the benefit of appellants, is likewise without merit. There is no question that had respondents been the sublessees of the appellants and, while in possession of the premises by virtue of such sublease, acquired a title to the premises which was superior to that of the appellants they would be adjudged to hold the property in trust for appellants. Such a condition does not exist in the instant case for the reason that there is no showing that appellants at any time had any title or right to the possession of the lot in question. Appellants' title, as we have heretofore stated, depended entirely upon the adverse possession of the premises and, not having held the premises by adverse possession, could execute no binding lease to respondents or any other person. The lease, or purported lease, was therefore a nullity in so far as passing any title or right of possession to respondents or any other person since there was no basis of title at the time of the execution of the lease in 1928 nor any title subsequently acquired by the appellants herein.

[5, 6] The purpose of the enactment of section 662 of the Code of Civil Procedure was to afford to trial courts, sitting without a jury, the right to correct any issue, finding, or judgment that it may have made in the original proceeding. The original trial of this case was for the purpose of determining appellants' title in the property or right to the possession thereof; that was the sole and only issue before the court. It is quite evident that upon the motion for rehearing the court questioned the correctness of its ruling upon this particular issue. It, therefore, had the right to set aside and vacate the findings and judgment, and to order further proceedings had upon this

limited issue in order that it might correct any mistake previously made. The order, therefore, granted by the court directing further proceedings upon the limited issue of adverse possession was within the spirit and letter of the Code provision applicable thereto and hereinbefore referred to.

It is therefore our conclusion that the judgment heretofore entered be modified by inserting therein mineral lot 80 situated and located in the north half of section 30, township 16 north, range 10 east, M. D. B. & M., subject to the easement of two certain ditches commonly known as Stehr ditch and Red Dog branch of the Yuba ditch, and that the findings and judgment be amended by correcting the description as herein indicated. The judgment, as modified, is hereby affirmed, respondents to recover costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.

---

23 Cal.App.2d 35

BOTELER v. CONWAY (CADWALLADER-GIBSON CO., Inc., Intervener).

Civ. No. 11521.

District Court of Appeal, Second District, Division 2, California.

Oct. 4, 1937.

Rehearing Denied Oct. 15, 1937.

Hearing Denied by Supreme Court Nov. 26, 1937.

1. Licenses 🔑39

A foreign corporation's stock, issued pursuant to preorganization subscription agreement of June 5, 1929, without obtaining permit from state commissioner of corporations, was void (St.1925, p. 972, § 25).

2. Licenses 🔑39

A foreign corporation's stock, issued in another state and delivered to purchaser in California without obtaining permit from state commissioner of corporations, being void, purchaser did not become stockholder liable for such corporation's debts (St.1925, p. 972, § 25).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by L. Boteler, trustee for the estate of Lloyd Products, Inc., bankrupt, against Jack Conway, in which the Cadwallader-Gibson Company, Inc., intervened. From a judgment for plaintiff and intervener, defendant appeals.

Reversed.

Gang & Kopp, Martin Gang, and Robert E. Kopp, all of Los Angeles, for appellant.

Loton Wells and Hubert F. Laugharn by Loton Wells, all of Los Angeles, for respondent.

Bauer, Macdonald, Schultheis & Pettit, by Lee G. Paul, all of Los Angeles, for intervener and respondent.

McCOMB, Justice.

From a judgment in favor of intervener and also plaintiff for costs, after trial before the court without a jury in an action to enforce a stockholder's liability, defendant appeals.

Viewing the evidence most favorable to plaintiff (Patten & Davies Lbr. Co. v. McConville, 219 Cal. 161, 164, 25 P.(2d) 429), the essential facts are these:

Joseph N. Landfield, Louis N. Landfield, and Robert C. Hulbert, desiring to engage in the business of manufacturing radios and to secure a loan from defendant, entered into an agreement June 5, 1929, which, among others, contained the following provisions:

"It is further hereby agreed that with reasonable dispatch the parties to this agreement shall cause to be incorporated a corporation under the laws of the State of Nevada, to be known as Monarch Radio Corporation, Ltd., or such other name as the incorporators shall decide upon.

"It is understood that the said Jack Conway and D. Chase Rich shall be additional incorporators and that said corporation shall acquire the partnership business at a consideration of 50 per cent of the total Common stock of the said corporation. It is understood and agreed that the said 50 per cent of the Common stock of the said corporation, together with any other emoluments which might be taken by the promoters, shall be divided as follows: 20 per cent thereof to J. N. Landfield, 20 per cent thereof to Louis N. Landfield, 26⅔ per cent to Robert C. Hulbert, and 33⅓ per cent to Jack Conway. It is distinctly understood and agreed that the interest in the corporation to be distributed to Jack Conway is in consideration of such aid as the said Conway might extend the corporation in the sale of such securities as the corporation might decide to distribute to the public."

Thereafter defendant indorsed on the bottom of the agreement hereinbefore mentioned the following:

"In consideration of the foregoing agreement I hereby agree to loan the foregoing partnership $10,000.00, upon the terms and conditions as hereinbefore set forth.

"Dated: Los Angeles, California, June 5, 1929

"Jack Conway
"[Signed]"

Subsequently it was arranged through a Nevada agency that a Nevada corporation under the name of Monarch Radio Corporation, Limited, be formed and stock of said corporation issued. This was done for the express purpose of evading the necessity of obtaining a permit from the corporation commissioner of the state of California to issue stock, and at no time was a permit ever obtained from the commissioner of corporations of the state of California for the issuance of the stock of Monarch Radio Corporation, Limited.

June 11, 1929, a Mr. Cheney presented to a directors' meeting of the Monarch Radio Corporation, Limited, in the city of Reno, state of Nevada, an offer to exchange certain assets in consideration of the Monarch Radio Corporation, Limited's issuing shares of its stock to the following persons in the amounts set opposite their respective names:

Louis N. Landfield....	5000 shares common
Robert C. Hulbert....	6667 shares common
J. N. Landfield......	5000 shares common
Jack Conway........	8333 shares common

The offer was accepted by the directors and certificates of stock issued to the parties and in the amounts as set forth above. The certificates were delivered to Mr. Cheney, who was authorized to receive them as the agent of Louis N. Landfield, Robert C. Hulbert, and J. N. Landfield. He mailed these certificates to Mr. Rich in Los Angeles, who in turn delivered them in the city of Los Angeles to the respective parties named therein, including defendant.

August 29, 1929, Monarch Radio Corporation, Limited, entered into an agreement with Lloyd Products, Inc., to purchase from the latter 10,000 radio cabinets at an agreed price.

September 3, 1929, Lloyd Products, Inc., by a written agreement assigned to intervener any and all amounts due it from Monarch Radio Corporation, Limited, or defendant until such times as all amounts due from Lloyd Products, Inc., to intervener were paid.

Upon Monarch Radio Corporation, Limited's, failure to perform its contract, suit was instituted against defendant to enforce a stockholder's liability against him.

These are the questions presented for our determination:

First: If the agreement of June 5, 1929, is considered as a pre-incorporation subscription agreement, was stock issued pursuant thereto void, unless a permit for the issuance thereof was first obtained from the corporation commissioner of the state of California?

Second: Was there substantial evidence to sustain the trial court's finding that on the 29th day of August, 1929, and thereafter up to and including the 17th day of September, 1929, defendant was the owner and holder of 8333 shares of the common stock of Monarch Radio Corporation, Ltd.?

[1] The answer to the first question must be in the affirmative. Section 25 of the Corporate Securities Act of the state of California (St.1917, p. 685, § 25, as amended by St.1925, p. 972) as it read June 5, 1929, the date of the purported preincorporation subscription agreement, was as follows:

"*Subscription for shares prior to incorporation.* Neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic corporation made prior to the incorporation thereof and set forth in the articles of incorporation; but such subscription shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter and, when incorporated, shall with reasonable diligence apply for and secure from the commissioner a permit authorizing the issue of the shares so subscribed for, in accordance with such subscriptions; provided, however, that except as may be specifically required by any law of this state, nothing herein contained shall be construed as permitting the collection of any portion of the consideration to be paid on account of such subscriptions, unless and until a permit shall have been issued by the commissioner authorizing such collection; nor except as may be specifically required by any law of this state, *nothing herein contained shall be construed as permitting the taking of subscriptions for any security of any company other than a domestic corporation* or to make collection of any portion of the consideration to be paid on account of subscriptions unless and until a permit shall have been issued by the commissioner authorizing the taking of such subscriptions or the collection thereof." (Italics ours.)

The law is settled that under section 25 of the Corporate Securities Act as it existed June 25, 1929, a preorganization subscription agreement is void, unless a permit for the same has been obtained from the commissioner of corporations of the state of California. Calif. Western Holding Co. v. Merrill, 7 Cal.App.(2d) 131, 142, 46 P.(2d) 175. Therefore, since it is conceded that no permit from the commissioner of corporations of the state of California was ever obtained in the instant case, stock issued pursuant to the agreement of June 5, 1929, was void.

[2] The second question must be answered in the negative. In the instant case the undisputed evidence is that the certificate of stock of Monarch Radio Corporation, Limited, standing in defendant's name, was issued in the state of Nevada and in that state was delivered to Mr. Cheney, who was not defendant's agent, and by him mailed to Mr. Rich in Los Angeles, Cal., and delivered by the latter to defendant in this state. Since the law is settled that stock of a foreign corporation issued in another state and delivered in this state to the purchaser is void, unless a permit is obtained from the commissioner of corporations of the state of California, Pollak v. Staunton, 210 Cal. 656, 662, 293 P. 26; Gillis v. Pan American Western Pet. Co., 3 Cal.(2d) 249, 251, 44 P.(2d) 311, defendant did not become a stockholder of Monarch Radio Corporation, Limited, and was not subject to a stockholder's liability for the debts of such corporation, Munton v. Bekins, 9 Cal.App.(2d) 228, 229, 49 P.(2d) 338.

In Munton v. Bekins, supra, which was a suit to enforce a stockholder's liability, wherein the defense was set up that the stock was void because issued in violation of the California Corporate Securities Act (St.1917, p. 673, as amended), Mr. Presiding Justice Crail, speaking for this court, says at page 229 of 9 Cal.App.(2d), 49 P.(2d) 338, 339: "If these defenses were, or either of them was, sustained by the evidence, the stock was void under the law as it then existed, and the appellant was not a stockholder of the corporation, and no recovery might be had against him as such. Golden Eagle Milling Co. v. Albin, 219 Cal. 357, 26 P.(2d) 475; Live Oak Cemetery Ass'n v. Adamson, 106 Cal.App.(Supp.) 783, 288 P. 29; Honn v. Hamer, 81 Cal.App. 276, 253 P. 336."

The foregoing conclusions make it unnecessary for us to pass upon the other propositions presented by counsel.

For the foregoing reasons the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

C. I. T. CORPORATION v. LAWSON.

Civ. 5754.

District Court of Appeal, Third District, California.

Sept. 29, 1937.

Hearing Denied by Supreme Court
Nov. 26, 1937.

1. Appeal and error 🔑1011(1)

Appellate courts are bound by trial court's findings on conflicting evidence, if supported by any substantial evidence.

2. Appeal and error 🔑1011(1)

It is province of trial court, hearing witnesses, to resolve and determine truth of matters as to which evidence is conflicting.

3. Alteration of instruments 🔑29
Sales 🔑181(11)

Evidence in action for amount due for X-ray equipment purchased by defendant *held* to justify trial court's conclusion that sale contracts were not changed after defendant's signature thereof, nor different merchandise than that described therein delivered.

4. Evidence 🔑589

In judging defendant's credibility and weight of his testimony as to changes in

contracts for sale of merchandise to him on trial of action for amount due thereunder, trial court had right to consider fact that defendant used portion of merchandise for number of months and paid nothing on price of merchandise admittedly received by him.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the C. I. T. Corporation against John D. Lawson. Judgment for plaintiff, and defendant appeals.

Affirmed.

Huston, Huston & Huston, of Sacramento, for appellant.

Bradford, Cross & Prior, of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendant upon two assigned claims on account of merchandise alleged to have been sold by one Andrew Gray, and delivered to the defendant. From this judgment the defendant appeals.

The complaint states two causes of action. The first cause of action alleged that on the 16th day of February, 1933, the plaintiff in due and regular course of business, and for value, purchased the conditional sales contract marked Exhibit A and annexed to the complaint, setting forth the merchandise sold and delivered by the said Andrew Gray to the defendant, and that upon said contract there is and was due at the time of the filing of the complaint the sum of $1,336.08. Attorney's fees were also asked as to said first cause of action. The second cause, after setting forth the assignment of the contract, etc., alleged the sale of merchandise by the said Andrew Gray and delivery to the defendant, and upon which contract there was due the purchase price of $1,516.32. The court awarded judgment in favor of the plaintiff in the sum of $3,202.40.

By way of defense the defendant in his answer alleged an alteration of the contracts, and that the contracts sued upon were not the contracts signed by him, and that the merchandise described in the complaint differed from the merchandise described in the contracts signed by him, and therefore the defendant was not liable.

It does not appear from the transcript that the defendant ever paid, or offered to pay, any portion of the purchase price of the merchandise that was received by him, nor does it appear from the transcript that the value of the merchandise received by the defendant was not equal to that alleged in the complaint.

The record shows that the merchandise involved relates to X-ray equipment. This equipment was sold through Andrew Gray (mentioned in the transcript as "Doctor Gray"). It appears that Dr. Gray was an agent for the sale of X-ray equipment, and had entered into and negotiated an agreement with the defendant for the sale and delivery to the defendant of the X-ray equipment mentioned in the transcript. A number of contracts are mentioned in the transcript, but only two of them are involved in this action.

[1, 2] A careful reading of the briefs and of the portions of the transcript referred to therein, exhibits the fact that there is presented for our consideration only a conflict of evidence. The law is well settled that, where there is a conflict of evidence, if there is any substantial evidence supporting the findings of the trial court, appellate courts are bound by such findings. In the instant case, while some of the testimony introduced on the part of the defendant would indicate that there had been some change in the list of merchandise ordered by the defendant after the signing of the order, on the other hand, we find that there is testimony indicating that the defendant is mistaken in this particular. It is needless to say that it is the province of the trial court, who heard the witnesses to resolve these matters and determine the truth thereof.

[3] Just prior to the signing of the contracts involved in this action the defendant was a practicing physician and was in charge of a clinic located at Woodland, Cal., and had, before entering into the contracts here mentioned, purchased considerable X-ray equipment from Dr. Gray, to be used at the clinic just mentioned. In the latter part of 1932, the defendant concluded to enter private practice and open offices in the city of Sacramento. It appears that one Dr. Woolford, whose offices were located in the California State Life building, was desirous of selling his practice, together with his X-ray equipment. On February 8, 1933, Dr. Woolford gave the defendant a ten-day option to purchase his business and equipment for the sum of $6,385.34. This equipment had been purchased by Dr. Woolford from Newton E. Wise under a conditional contract, which contract was assigned to the

Peoples Finance & Thrift Company of Sacramento. The plaintiff produced and introduced two contracts executed by the defendant, one dated February 8, 1933, the other dated February 16, 1933. The contracts appear to be complete in every way. At the end of each contract is a certificate of installation signed by the defendant, and, on the back of each contract, an assignment executed by Andrew Gray to the plaintiff. The certificates of installation just referred to recite that the merchandise mentioned in the contracts has been received and installed in the offices of the defendant. On one of the contracts it appears that the list of merchandise was set forth upon slips of paper attached to the original contract by clips. The defendant claims that the contract dated February 8, 1933, contains two items which were not included in the contract signed by him. As to the contract dated February 16, 1933, it is the defendant's claim that the list of items attached thereto is not the list which was attached to the contract; that the defendant made a copy of the list which was introduced by him marked Exhibit B, showing a claimed difference of $180.32. The contract calls for twenty-four monthly payments in the sum of $63.18 each. By multiplying the amount of the monthly payments by twenty-four, we find the total charge to be $1,516.32, only a difference of eight cents, which furnished the basis for the trial court to come to the conclusion that all of the items mentioned as merchandise in the contract, including the charges set forth therein, were just exactly as they were upon the contract when it was signed by the defendant. The monthly payments and the other items were not listed with the merchandise mentioned therein, and exhibits very clearly that the value of the merchandise, financing, charges, etc., were all included and figured out as stated, providing for twenty-four monthly payments in the exact sum mentioned. The difference of eight cents is so negligible that it must have been discarded by the one who made the calculations.

The testimony of the defendant was such as to justify the court in concluding that the defendant's copies of contracts made by him were not accurate or complete, as some of the exhibits were carbon copies of the clipped lists as shown by the following testimony:

"Q. Now, at that time did you retain a list or copy of the list that was attached to that contract? A. I did, yes.

"Q. A carbon copy of it? A. The listing as—it was not a carbon copy. The listings were all made and the papers all drawn up in Dr. Gray's office. That peculiar type is all on Dr. Gray's typewriter. I, however, made a listing, copied it from there, from the contract, at the time that I returned, from the contract for negotiation. I retained a listing which I destroyed on the return of my copy of the contract.

"Q. You retained a listing which you destroyed, you say? A. As soon as I received my copy back from Gray. Then I destroyed the copy that I had made at the time the contract was executed.

"Q. Oh, the copy that you had made? A. Yes; after I compared it with the listing, I destroyed it.

"Q. Then this copy here is not the copy at the time you signed the contract? A. That is a copy made on Mr. Gray's typewriter, yes. It is a duplicate of the original, or is the original, or a duplicate.

"Q. Or a duplicate of it? A. Yes.

"Q. Well, now, have you the—how many contracts did you sign? Did you sign them in triplicate? A. They were signed in duplicate, as I remember. I couldn't be positive. They were triplicate copies, but I don't believe the triplicate was ever signed."

The transcript shows that the court made the calculations with regard to the twenty-four monthly payments and ascertained the amount thereof to be within eight cents of the value of the merchandise, and all of the costs and expenses set forth in the contract.

The record shows that Dr. Gray became involved in financial difficulties and disappeared and was not available as a witness at the trial of this cause.

As to the other contract and the one where no clips were used, it is shown that the defendant certified as to the installation thereof, and, when two representatives of the plaintiff called at his offices to inspect the installation, made no claim whatever that the contracts had been changed, but did claim that he had not received all of the merchandise. This circumstance was something which the trial court had a right to consider in coming to the conclusion as to whether the claim of the defendant was or was not well founded that the contracts had been changed after his signature had been attached thereto.

In so far as the Woolford deal is concerned, it seems to us immaterial to consider the same, for whether the defendant did or did not receive full credit in relation to such equipment is wholly immaterial as to the right of the plaintiff to prevail in this action.

Another factor which the trial court had to consider was the fact that the defendant produced no original copies of the contract, but only copies made by himself, and the matters which we have set forth herein justify the trial court in concluding that the defendant's copies were inaccurate.

[4] In judging of the credibility of the defendant, and of the weight to be given to his testimony, the trial court had a right to, and doubtless did, take into consideration the fact that the defendant had used a portion of the merchandise for a number of months, and had not paid any of the purchase price of the equipment which he admitted he received, but finally attempted to escape payment for any portion thereof on the alleged grounds of changes in the contract.

What we have set forth we deem sufficient to justify the conclusion of the trial court and sustain the judgment.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

---

23 Cal.App.2d 40

In re LITTLE'S ESTATE.

EASTMAN et al. v. WAMSLEY et al.
Civ. 11595.

District Court of Appeal, Second District, Division 2, California.

Oct. 4, 1937.

Hearing Denied by Supreme Court Nov. 26, 1937.

1. Wills 🔑317

In will contest, submission of special interrogatory requiring jury to find whether testatrix was of sound mind at time alleged will was executed was not erroneous as requiring jury to pass upon a conclusion of law.

2. Wills 🔑31

As respects capacity to make a will, a person of "unsound mind" is an adult who from infirmity of mind, including insanity, idiocy, and imbecility, is incapable of managing himself or his affairs.

[Ed. Note.—For other definitions of "Unsound Mind," see Words & Phrases.]

3. Wills 🔑21

The term "disposing capacity or mind" is an alternative or synonymous phrase in the law of wills for "sound mind" and "testamentary capacity."

[Ed. Note.—For other definitions of "Disposing Mind and Memory," "Sound Mind" and "Testamentary Capacity," see Words & Phrases.]

4. Courts 🔑91(1)

Supreme Court's decision which had never been overruled was binding upon District Court of Appeal, notwithstanding case had not been ordered reported in the official reports of the Supreme Court.

5. Wills 🔑317

In will contest, submission of special interrogatory requiring jury to find whether alleged will was a free and voluntary act of testatrix was not erroneous as calling for jury to pass upon a conclusion of law, but was proper as asking for a finding on an ultimate fact.

6. Wills 🔑317

In will contest, court must submit special interrogatories to jury, but need not submit any particular interrogatories requested by either side so long as the ultimate issues are placed before the jury by proper interrogatories.

7. Wills 🔑317

Where court submitted special interrogatories requiring jury to find whether testatrix was of sound and disposing mind at time alleged will was executed and whether it was her free and voluntary act, refusal to submit special interrogatories requiring jury to find whether testatrix had that quantum of mental capacity which enabled her to know and understand the nature and consequence of her act and whether beneficiary exercised such influence upon testatrix as to make will not the expression of her own desires was not error.

8. Wills 🔑318(3)

Findings that decedent was of unsound mind and that she executed alleged will under undue influence were not inconsistent so as to require reversal of judgment denying admission of alleged will to probate.

9. Wills ⟹156

Soundness of mind and body does not imply immunity from undue influence.

10. Wills ⟹156

It is common knowledge that a person in declining health, whose body is weakened and emaciated by disease, is, to a more or less degree, impaired in his mind as respects susceptibility to undue influence in making will.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding in the matter of the estate of Margaret Martha Little, also known as Margaret M. Little, deceased, by May C. Eastman and another, contestants, against C. O. Wamsley, as executor and as legatee and devisee, and all other persons interested in the will of such decedent. Judgment for contestants, and defendants appeal.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellants and respondents.

Leslie L. Heap, of Los Angeles, for respondents and contestants.

McCOMB, Justice.

This appeal transferred by the Supreme Court to this court for decision pursuant to the provisions of article 6, § 4c, of the Constitution of the State of California, is from a judgment entered on the verdict of a jury denying probate to a document dated September 28, 1935, alleged to be the last will of Margaret Martha Little, deceased.

The essential facts are these:

Harry A. Watson filed a petition for the probate of a document dated August 9, 1929, alleged to be the last will of Margaret Martha Little, deceased. Thereupon C. O. Wamsley filed a petition alleging that said decedent left a document dated September 28, 1935, which he alleged was her last will, and prayed that the same be admitted to probate. To this petition Harry A. Watson and May C. Eastman filed contests, alleging as grounds that:

(1) At the time of the execution of the alleged will of September 28, 1935, decedent was of unsound mind.

(2) Such document was executed through the undue influence of C. O. Wamsley.

After the contest had been duly and regularly tried, the trial judge submitted to the jury the special interrogatories hereinafter set forth, which they answered in the negative.

Appellant relies for reversal of the judgment on the following propositions:

First. The trial court erred in submitting to the jury the following special interrogatories:

(a) Was Margaret Martha Little of sound and disposing mind at the time the alleged will dated September 28, 1935, was executed?

(b) Was said alleged will dated September, 28, 1935, the free and voluntary act of said Margaret Martha Little?

Second. The trial court erred in refusing to submit to the jury the following special interrogatories requested by appellant:

(a) Did Margaret M. Little at the time of making the will in which Wamsley is beneficiary have that quantum of mental capacity which enabled her to know and understand the nature and consequence of her act?

(b) Did Wamsley exercise such influence upon Margaret M. Little as to produce an effect upon her mind by which the will which was executed in his favor was not the expression of her own desires but constrained her to make a disposition of her property contrary to and different from what she would have done had she been permitted to follow her own inclination or judgment?

Third. The finding that decedent was of unsound mind at the time of the execution of the alleged will dated September 28, 1935, was inconsistent with the finding that in executing said document decedent was acting under the undue influence of C. O. Wamsley.

[1-3] Appellant's first proposition is untenable. In Clements v. McGinn, 4 Cal.Unrep.Cas. 163, 33 P. 920 (for proceedings in trial court see Estate of McGinn, 3 Coff. Prob. 26, 67 [1909]), our Supreme Court expressly held that a special interrogatory similar to that set forth in paragraph (a) of appellant's first proposition called for a finding upon a question of fact and did not ask the jury to pass upon a conclusion of law. At page 167 of 4 Cal. Unrep. Cas., 33 P. 920, 921, the court says: "The first contention of the appellants is that the eleventh finding of the jury is not a question of fact, but a conclusion of law. The term 'sound mind,' as applied to the condition or status of testator, was a fact. It was for the purposes of the case an ultimate fact, in the

establishment of which the physical condition of the party, his acts and conduct, were the probative facts. According to the finding of the jury, testator was not of sound mind at the date of the execution of the will; in other words, he was of unsound mind. 'A person of unsound mind is an adult who from infirmity of mind, is incapable of managing himself or his affairs. The term, therefore, includes insane persons, idiots, and imbeciles.' Black's Law Dictionary; Jenkins v. Jenkins' Heirs, 2 Dana [(Ky.) 102], 103 [26 Am.Dec. 437]. It is the possession of a sound mind which is one of the requisites to capacity to make a will. Civ.Code, § 1270. The term 'disposing capacity or mind' is an alternative or synonymous phrase in the law of wills for 'sound mind' and 'testamentary capacity.' Black's Law Dictionary. The expression 'unsound mind' equally stands for and includes the want of a disposing mind or testamentary capacity."

[4] It is to be noted that this case has never been overruled and is therefore binding upon this court. The fact that this case was not ordered reported in the official reports of the Supreme Court does not detract from its binding force. 7 Cal.Jur. 644; MacDonald v. MacDonald, 155 Cal. 665, 672, 102 P. 927, 25 L.R.A.(N.S.) 45.

In the early history of our Supreme Court it was the practice to have all of its decisions officially reported. Thereafter there was an interim during which only such cases as the court ordered published appeared in the official reports. Subsequently the earlier practice was resumed and all opinions of the Supreme Court were printed in the official reports. The cases which had not been ordered officially reported have been collected and published in what is known as California Unreported Cases (see preface to volume 1 of California Unreported Cases (1913). We make this statement in view of appellants' contention that the foregoing case is not binding because it does not appear in the official reports of the Supreme Court. Estate of Clark, 180 Cal. 395, 397, 181 P. 639, also approves a special interrogatory similar to the one under discussion.

[5] The special interrogatory set forth in paragraph (b) of appellant's first proposition did not call for the jury to pass upon a conclusion of law but asked for their finding on an ultimate fact. Estate of Gould, 188 Cal. 353, 365, 205 P. 457.

[6, 7] The second proposition is untenable. It is the unquestioned duty of the trial court in a will contest to submit special interrogatories to the jury; however, the trial court need not submit any particular interrogatories requested by either side so long as the ultimate issues are by proper interrogatories placed before the jury. In the present case the interrogatories submitted to the jury were correct and called for the answer of the jury to the ultimate facts in issue.

Therefore the trial court properly declined to submit the interrogatories requested by appellant.

[8] The final proposition urged by appellant is without merit. The jury's findings that decedent was of unsound mind and also executed the document dated September 28, 1935, under undue influence are consistent. Estate of Olson, 19 Cal.App. 379, 386, 126 P. 171; Estate of Motz, 136 Cal. 558, 562, 69 P. 294.

[9, 10] In Estate of Olson, supra, at page 386 of 19 Cal.App., 126 P. 171, 174, the court says: "Soundness of mind and body does not imply immunity from undue influence. It may require greater ingenuity to unduly influence a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind. But history and experience teach that the minds of strong men and women have often been overborne, and they have been by a master mind persuaded to consent to what, in their sober and normal moments, and free from undue influence, they would not have done."

In Estate of Motz, supra, at page 562 of 136 Cal., 69 P. 294, 295, our Supreme Court says: "As to the findings that the will was executed under undue influence, and that deceased was not of sound mind at the time of the execution, they may be considered together. In fact, the mental and physical condition of the testator at and about the time of the execution of a will is such an important factor in determining whether or not the will was that of the testator, or an instrument procured by coercion and fraud, that the two questions are kindred, and very closely interwoven and connected with each other. It is a matter of common knowledge that a person in declining health, whose body is weakened and emaciated by disease, is, to a more or less degree, impaired in his mind. The strength of will, the quickness of apprehension, and the reasoning powers become impaired as the body becomes enfeebled. In such case the testator is peculiarly exposed to the secret machinations and importunities of designing persons, who, in the guise of love and friendship, have surrounded him and administered to his wants as life and reason have gradually ebbed away."

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

22 Cal.App.2d 667

Ex parte KNAESCHE.

Cr. 1958.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1937.

Rehearing Denied by Supreme Court Oct. 28, 1937.

1. Pardon 🔑10

The Governor, as well as state parole board, has power to revoke paroles.

2. Pardon 🔑7, 10

Facts, stipulated by parties to habeas corpus proceeding, that state parole board sent notices of pendency of petitioner's application for parole to Superior Court judge, sheriff and district attorney of county from which petitioner was sentenced to state prison and received ten letters from such officials in response thereto, showed board's compliance with all legal requirements in granting parole, so as to preclude revocation thereof by Governor for failure to send notices of meeting at which granted to such officials, though no notices stating specifically date for consideration of application therefor were sent at least 30 days before such meeting (St.1901, p. 82; St.1915, p. 981; St.1929, p. 80; Pen.Code, § 1168, as amended by St.1929, p. 1930).

3. Pardon 🔑7

Where application for parole is denied after sending notices of pendency thereof to superior court judge, sheriff, and district attorney of county from which applicant was sentenced to state prison, additional notices need not be sent before parole board again acquires jurisdiction to grant application on reconsideration (Pen.Code, § 1168, as amended by St.1929, p. 1930; St.1929, p. 80).

4. Habeas corpus 🔑94

Court may review executive order imposing personal restraint, such as Governor's order revoking parole granted prisoner by state parole board, in his habeas corpus proceeding for release from prison warden's custody, for purpose of ascertaining whether order is jurisdictionally supported (St. 1915, p. 981; Pen.Code, § 1168, as amended by St.1929, p. 1930).

Proceeding by Herman Knaesche for a writ of habeas corpus requiring petitioner's release from the custody of the Warden of the State Prison at San Quentin.

Order to release petitioner from the warden's custody, subject to the conditions and restrictions in a parole granted him by the State Board of Prison Terms and Paroles.

Leo R. Friedman, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondent.

PER CURIAM.

At a regular meeting of the state board of prison terms and paroles held on March 24, 1936, it was ordered that petitioner, a prisoner in the state prison at San Quentin, be released on parole into the custody of the former warden of said state prison, the order to become effective on April 15, 1936. Petitioner was released accordingly, and on June 12, 1936, said board changed the conditions of the parole by directing that petitioner "leave the United States of America, never to return," and ordered the state parole officer to arrange for petitioner's expatriation. Before such arrangements were completed, however, and on July 1, 1936, the Governor of California, of his own motion, made and signed an executive ex parte order canceling and revoking said parole and directing that petitioner be returned to the state prison; and on July 2, 1936, pursuant to said executive order, petitioner was apprehended and redelivered into the custody of the warden of said state prison. Challenging the legality of the Governor's order of revocation, petitioner in January, 1937, applied to and obtained from the Supreme Court a writ of habeas corpus, which was made returnable before the superior court in and for the county of Marin, and in March, 1937, after a hearing before said superior court, petitioner was remanded to the custody of the warden of said state prison. Thereupon petitioner instituted the present proceeding in habeas corpus in this court.

[1] It is clearly within the power of the Governor, as well as the parole board, to revoke paroles; but it has been the statutory law of the state for many years that no parole shall be revoked "without cause, which cause must be stated in the order" of revocation. It was so declared in 1915 (Stats.1915, p. 981), and again in 1929 (Stats.1929, p. 1930, amending Pen.Code, § 1168), and notwithstanding the parole statutes have been amended or reenacted from time to time, the particular provision above referred to has never been altered or changed.

[2] The ground upon which the Governor's order of revocation was based was, as stated therein, that "it appears from telegrams received from the judge of the superior court before whom the prisoner was tried and convicted, the district attorney and the sheriff of the county from which the prisoner was sentenced, that no written or other notice of such meeting (of March 24, 1936) to consider the granting of such parole to such prisoner was received by said officers of said county, or any of them, and * * * while the records in the office of the clerk of said (parole) board contain carbon copies of such written notices dated February 1, 1935, there is no further or any other record or evidence that such notices were actually sent."

Until 1929 there was no law requiring notices to be given of the pendency of applications for parole. Nevertheless it had been the custom of the parole board up to that time to send such written notices to the judge of the superior court, the sheriff, and the district attorney of the county from which the prisoner was committed. In 1929 two statutory amendments were enacted requiring such written notices to be sent. One was an amendment to the parole law (Stats.1929, p. 80), and the other an amendment to the indeterminate sentence law (Pen.Code, § 1168, as amended by Stats. 1929, p. 1930). The wording of the amendments was substantially the same and provided that, at least thirty days before the board shall meet to consider the granting of a parole to any prisoner, the board shall send written notices thereof to the judge of the superior court before whom the prisoner was tried and convicted, and to the district attorney and the sheriff of the county from which the prisoner was sentenced.

Petitioner entered the penitentiary in 1919 under a life sentence imposed by the superior court of Mendocino county for the crime of murder, to which he had entered a plea of guilty. After having served seven years, he was entitled under the provisions of the statute (Stats.1901, p. 82) to apply for parole, and he filed such an application. As shown by the written stipulation of facts on file herein, said application came on regularly for consideration and was either expressly or automatically continued for reconsideration approximately twelve times; and finally, in March, 1936, after petitioner had served approximately seventeen years of his sentence, his application was granted, to become effective on April 15, 1936. With respect to the question of the giving of written notice of the pendency of the application, it appears from said written stipulation of facts that both before and after the amendments of 1929 the board, as was its custom in all cases, sent written notices of the pendency of petitioner's application to the judge of the superior court, the sheriff, and the district attorney of Mendocino county, and that in response thereto the board received ten letters from said officials. Two were sent to the board by the superior judge, dated September 14, 1926, and October 1, 1932; two by the sheriff, dated September 18, 1926, and January 17, 1930; and six by the district attorney, dated August 18, 1926; June 29, 1929; September 17, 1929; September 28, 1932; February 14, 1933; and September 22, 1933. The board did not keep a complete record either by carbon copy or notation of the notices so sent, but there was found among the files in petitioner's case carbon copies of five letters sent to the judge of the superior court and four to the district attorney, advising them that petitioner's application for parole would be considered on a future monthly calendar, specifying the month in which the application would be so considered. Those sent to the superior judge were dated respectively July 30, 1926, June 27, 1929, September 28, 1932, September 19, 1933, and February 1, 1935; and those to the district attorney were dated respectively

June 27, 1929, September 28, 1932, September 19, 1933, and February 1, 1935. The files did not disclose copies of any letters to the sheriff, but, as shown by the stipulated facts, it was the custom of the parole board to send such letters to the sheriff as well as to the other officials named; and, as above stated, in response to the notices so sent the board received two letters from the sheriff, dated respectively September 18, 1926, and January 17, 1930.

In view of the foregoing facts, we are unable to sustain respondent's contention that in granting petitioner's parole said board did not comply with all necessary legal requirements.

It is argued in support of the executive order of revocation, and said order is evidently based upon the theory that under the amendments of 1929 the parole board acts without jurisdiction, and consequently its action is invalid unless at least thirty days prior to the particular meeting at which the parole is granted notices are sent by the board to the officials named, stating specifically the date on which the application for parole is to be considered, and that this is so regardless of how many previous notices have been sent to said officials or their predecessors in office, of the pendency of the applications, and regardless also of how many letters have been received by the board fom said officials in response to the notices previously sent.

We find nothing in the law to justify such construction; and, since the adoption of the view contended for would result in casting doubt upon the validity of a large number of paroles granted by the parole board since 1929 upon the assumption that such was not the law, we are not prepared, in the absence of convincing reasons, so to hold.

[3] Nor are we able to agree to respondent's further contention that, where an application for release on parole is denied after notice of the pendency thereof has been sent to the officials named, new notices must be sent to said officials before the parole board again acquires jurisdiction to grant the application on reconsideration. Such contention in our opinion not only fails to find support in the provisions of the statute but, as would appear from the record before us, it would seem wholly impracticable to follow such procedure. Under the rules adopted by the parole board pursuant to statutory authority, the denial of an application for release on parole automatically continues the hearing of the application for one year, even though no express order is made by the board to that effect; furthermore, the rule of the board is that, when an application is placed on a future monthly calendar to be heard, it means simply that, if said application cannot be reached in its regular turn during the month specified, it will be taken up and considered as soon as practicable thereafter. If, therefore, as required by the statute and as was done in the present case, at least thirty days before the board meets to consider the application it sends written notices to the officials named of its intention so to do, the board has complied with the provisions of the law, and it is unnecessary thereafter to send additional notices in case of a postponement of the hearing.

[4] Respondent raises the additional question that the executive order revoking the parole is not subject to review in a proceeding of this kind. It has been held generally, however, that it is within the province of the courts to review on habeas corpus an executive order made in a proceeding such as this involving personal restraint, for the purpose of ascertaining whether or not the order is jurisdictionally supported. Such power has been specifically exercised in other jurisdictions to review executive orders revoking paroles, and, while there does not seem to be any case identical in point in this state, such power has been exercised to review executive orders growing out of extradition proceedings (In re Shoemaker, 25 Cal.App. 551, 144 P. 985), and there would seem to be far more justification for the exercise of such power concerning executive orders revoking paroles.

In view of the conclusions we have reached on the issues above discussed, it becomes unnecessary to inquire into the additional points made by petitioner in furtherance of his application for release; and for the reasons stated it is ordered that petitioner be released from the custody of the warden of said state prison, subject, however, to the parole heretofore granted by the state board of prison terms and paroles, and to all the conditions and restrictions contained therein.

23 Cal.App.2d 103

In re RUSSELL'S ESTATE.

RUSSELL v. RUSSELL et al.

Civ. 11597.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1937.

1. Judgment ⚷713(2)

A judgment decreeing that daughter of a decedent, as surviving joint tenant, was owner of deposit standing in decedent's name in action against decedent's administratrix, was not res judicata of right to charge administratrix with amount of deposit in proceeding by administratrix to settle her final account when administratrix failed to account for deposit since the two proceedings were not the same.

2. Executors and administrators ⚷465

Property coming under control of an administratrix and inventoried by her as property belonging to the estate, even though claimed adversely by another, ordinarily must be accounted for by such administratrix in course of her administration of the estate.

3. Executors and administrators ⚷465

An administratrix who failed to account for deposit standing in name of decedent was chargeable with amount of such deposit, notwithstanding a judgment was recovered against her in action by decedent's daughter adjudging that daughter, as surviving joint tenant, was owner of deposit, since question was not whether some third person got a judgment against administratrix or against the estate but how administratrix actually accounted for money which was in her possession.

◆

Appeal from Superior Court, Los Angeles County; J. W. Mullins, Judge.

Proceeding in the matter of the estate of John W. Russell, sometimes known as John Russell, deceased, with respect to the petition of Louise V. Russell, administratrix, and J. A. Somerville, administrator who succeeded her, for the settlement of their final accounts and for distribution wherein Dorothy E. Russell and another filed a contest. From an order charging Louise V. Russell, administratrix, with certain items, she appeals.

Affirmed.

Willis O. Tyler, of Los Angeles (James H. Sims, of Los Angeles, of counsel), for appellant.

Julius V. Patrosso, of Los Angeles, for respondent Dorothy E. Russell.

Burdette J. Daniels, of Los Angeles, pro. per.

CRAIL, Presiding Justice.

This is an appeal by Louise V. Russell from an order settling her account as administratrix of the estate of John W. Russell, deceased, whereby she was charged, among other items, with the sum of $5,249.11, representing a bank deposit standing in the name of the decedent at the time of his death and large portions of which she admittedly converted to her own use.

John W. Russell died intestate on July 3, 1934, and on August 8, 1934, appellant was appointed as administratrix of his estate and continued to act as such until April 18, 1935, when her resignation was accepted and J. A. Somerville was appointed to succeed her. Mr. Somerville continued to act as administrator until October 21, 1936, when by order of court he was removed and his letters of administration revoked. On November 10, 1936, respondent Burdette J. Daniels was appointed as administrator of the estate and at all times since has continued to be and now is the administrator thereof. Prior to his death and on April 27, 1934, John W. Russell was adjudged incompetent, and the appellant was appointed as guardian of his estate.

At that time and at all times thereafter until July 2, 1934, the day preceding the death of the incompetent, there was on deposit in the Bank of America in the name of the incompetent the sum of $5,249.11. On July 2, 1934, the appellant withdrew this sum and deposited the same with the Farmers & Merchants National Bank in an account in the name of "Estate of John W. Russell, incompetent, Louise V. Russell, guardian." The whole of said sum was on deposit in said bank at the death of John W. Russell on the following day. On November 18, 1935, the appellant, as administratrix, and J. A. Somerville, as administrator, executed under oath and filed with the court their joint inventory of the property and assets of the estate of said decedent, wherein it is set forth that the estate of the decedent consisted of cash in the sum of $5,528.67.

of which sum $5,249.11 represented the sum on deposit with the Farmers & Merchants National Bank at the date of the death of decedent. This is the only inventory ever filed in the estate proceedings. On the 5th day of December, 1935, J. A. Somerville, as administrator of the estate, filed his first and final account and petition for distribution, which purported to be a report of the administration of the estate by himself and his predecessor, the appellant, wherein he charged himself with the sum of $5,528.67 in cash, being the same sum set forth in the inventory, and, after deducting certain credits to which he claimed to be entitled, alleged he had a balance on hand for distribution of $3,793.62. Upon the same day appellant, as guardian of the estate of John W. Russell, incompetent, filed with the court her first and final account and report as such guardian, wherein she charged herself as such with various sums of cash aggregating $772.26, but not the said sum of $5,249.11 which, as before stated, was included in the joint inventory of J. A. Somerville and appellant in this proceeding. Up to this time and until ordered so to do by the court as hereinafter stated, the appellant had filed no separate account of her administration of the estate.

The account of the appellant as guardian and of J. A. Somerville as administrator came on for hearing the same day, January 15, 1936, at which time the account of the appellant as guardian was settled by the court, the appellant as such guardian being charged with a balance of cash in the sum of $479.56, and upon motion of J. A. Somerville and his counsel the first and final account of said J. A. Somerville as administrator was ordered off calendar.

Thereafter, pursuant to an order of the court directing appellant to file an account as administratrix, the appellant filed what she denominated an "Amended First and Final Account and Report and Petition for Discharge," wherein she alleged that as guardian she had withdrawn the sum of $5,249.11, above mentioned, from the Bank of America where it was on deposit in the name of J. W. Russell and redeposited the same to the credit of the incompetent in the Farmers & Merchants National Bank; that after the death of J. W. Russell, the appellant assuming "that the moneys on deposit belonged to his estate," she made application for letters of administration. It was further alleged that thereafter during the pendency of the administration proceedings an action had been instituted by Dorothy E. Russell against appellant and J. A. Somerville as administrator, wherein the said Russell claimed ownership of the said fund, in which action judgment was rendered in favor of said Russell and against the defendants, adjudging said Russell to be the owner of said fund.

Upon the hearing of her amended account it appeared from the testimony of the appellant, and it is undisputed that, aside from said credits claimed by her and set forth therein, the appellant had converted the sum of money in question to her own use, and had never delivered any portion of it to Dorothy E. Russell in satisfaction of the judgment obtained by her as above set forth or to either of the administrators who succeeded her. It further appeared that the action instituted by Dorothy E. Russell was one wherein she claimed that the fund in question, though standing in the name of the decedent, was in fact a joint tenancy account of herself and her deceased father, and the decree entered therein adjudged the same to have been a joint tenancy account which by operation of law vested in Dorothy E. Russell upon the death of John W. Russell.

[1-3] The appellant's primary contention is that the probate court cannot require her, a resigned administratrix, in settling her final account, to account for the specific sum of $5,249.11, the title of which was in dispute between herself and a third person, where she shows that such third person obtained a judgment against her in a superior court action holding that said third person is the owner and entitled to the possession of said specific sum.

The answer is that the instant order is one in favor of the estate of the decedent against her, whereas the former judgment was by her own statement that of a third person against her. Therefore, the parties to the two actions were not the same and the former judgment was not a bar to the recovery herein. Property coming under the control of an administratrix and inventoried by her as property belonging to the estate, even though claimed adversely by another, ordinarily must be accounted for by such administratrix in the course of her administration of the estate. The question herein is not whether some third person got a judgment against her or against the estate, but how does she actually account for the money which was in her possession. Elizalde v. Murphy, 11 Cal.App. 32, 103 P. 904. There is no merit in appellant's contention.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.

---

23 Cal.App.2d 130

UNITED LUMBER YARDS, Inc. v.
MODESTO IRR. DIST.

Civ. 5755.

District Court of Appeal, Third District, California.

Oct. 11, 1937.

Rehearing Denied Nov. 10, 1937.

Hearing Denied by Supreme Court Dec. 9, 1937.

1. Sales 🔑357(1)

In action for alleged balance due on contract which gave buyer the benefit of reduction in price of cement on the open market during life of contract, burden was on buyer to show reduction of price on open market during life of contract in order to avoid paying difference between contract price and alleged market price.

2. Sales 🔑76

In action for alleged balance due on contract which gave buyer the benefit of any reduction in market price of cement during life of contract, competitor's schedule of prices upon which buyer subsequently relied to secure reduction of price was not deemed fraudulent as evidence of a reduction of the "market value" merely because competitor had been an unsuccessful bidder on the contract.

3. Sales 🔑76

Stipulation in contract for sale of cement giving buyer benefit of reduction of price "on the open market" merely meant that buyer would receive benefit of price for which the commodity might be purchased in fair trade on the market and not at a stimulated market price created by fraudulent practices.

4. Sales 🔑76

"Market price," which may differ greatly from "market value," implies price or value in an open market as between one who desires, but is not compelled, to buy, and one who is willing, but not compelled, to sell.

[Ed. Note.—For other definitions of "Market Price" and "Market Value," see Words & Phrases.]

5. Sales 🔑76

Under contract for sale of cement giving buyer benefit of reduction in price "on the open market" during life of contract, another leading cement industry's quotation during life of contract of reduced price on identical type of cement, and its issuance of a printed schedule of prices offering to sell that cement to any one who desired to purchase it at such reduced price, furnished substantial evidence of a reduced price on the commodity on the open market and entitled buyer to benefit of reduced price from seller.

* * *

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by the United Lumber Yards, Inc., against the Modesto Irrigation District. Judgment for defendant, and plaintiff appeals.

Affirmed.

Dennett & Zion, of Modesto, for appellant.

Vernon F. Gant, of Modesto, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

From a judgment which was rendered in favor of the defendant to the effect that plaintiff take nothing in this suit for an alleged balance due upon the contract price of cement sold and delivered, this appeal was perfected.

Upon competitive bids therefor, the plaintiff was awarded a contract in January, 1935, to supply defendant with approximately 18,000 barrels of Monolith Tufa cement at a cost of $1.84 per barrel. The contract contained the following provision: "It is hereby agreed that should the price per barrel of Tufa Cement, on the open market during the life of this contract, be reduced lower than the price bid per barrel for Tufa Cement in this contract, that the Modesto Irrigation District shall have the benefit of such reduction."

Pursuant to that contract plaintiff delivered after February, 1935, to the defendant from time to time during the life of the agreement a total of 10,500 barrels of cement, for which it was fully paid with the exception of $817.43, which sum represents the alleged reduction of the price of that cement "on the open market during the life of this contract." The court found, in effect, that the price of the cement had been reduced "on the open market" in that vicinity during the life of the contract approximately 11 cents per barrel, and that the plaintiff had therefore been fully paid the contract price for all cement sold and delivered thereunder. Judgment was rendered accordingly. From that judgment the plaintiff has appealed.

[1] The burden was on the defendant to show a reduction of the price of cement on the open market during the life of the contract. We are of the opinion there is ample evidence to support the findings of the court to the effect that there was a reduction in the price of Tufa cement in that district in the open market during the life of the contract to an amount which fully covers the plaintiff's claim. All of the cement was furnished by plaintiff pursuant to the contract between January 3, 1935, and March 24, 1935. Only 3,750 barrels were delivered before February 13th. Mr. N. M. Cecil, engineer for the Modesto Irrigation District, testified that on February 13, 1935, the defendant's attention was called to the fact that the Monolith Portland Cement Company issued a schedule under which it sold Monolith Tufa cement at reduced prices throughout the state of California, effective from the last-mentioned date, fixing the price, including the cost of delivery to the various destinations; that this schedule fixed the price at $1.70 per barrel at Modesto, and $1.73 per barrel at Waterford, where the cement in question was to be delivered; that this reduced schedule of prices remained fixed at those figures until June 28, 1935. This schedule of prices was received in evidence without objection. Mr. Cecil further testified that the defendant purchased from the Yosemite Cement Company in the latter part of February two carloads of cement at the reduced price of $1.71 per barrel. On April 1, 1935, the plaintiff sent to the defendant a tabulated statement of its account, claiming a balance due for previous deliveries of cement at the rate of $1.84 per barrel, amounting to the sum of $886.62. On the last-mentioned date, pursuant to defendant's claim of a reduction of the price of cement on the open market in that vicinity in accordance with previous communications with the plaintiff, a warrant for the sum of $836.62 was drawn in favor of the plaintiff in full payment of that claim on the basis of $1.73 per barrel. Upon that warrant there was indorsed "In full payment of items listed below." This transaction furnishes some evidence of a recognition on the part of the plaintiff of a valid reduction of the quoted contract price of $1.84 per barrel to $1.73 per barrel. On February 19, 1935, the defendant wrote plaintiff the following letter:

"Enclosed find three confirming purchase orders for cement to be delivered to our construction jobs on the upper main canal.

"We have received printed price lists showing that Tufa Cements have dropped in price on the open market. Our contract with you calls for cement to be delivered to Waterford at the price of $1.84 per barrel. The new printed price lists, effective February 13, 1935, show Tufa cement delivered to the same location to be selling on the open market at $1.73 per barrel.

"Our contract agreement with you specifies that should the open market be lower than that of the contract agreement, the Modesto Irrigation District is to receive the benefit of such lower price.

"In accordance with this agreement we have reduced the price on our purchase orders from $1.84 per barrel to $1.73 per barrel, f.o.b. Waterford, less the 10¢ per barrel discount for payment in fifteen days."

There is substantial evidence of a reduction of the price of Monolith Tufa cement on the open market at Waterford during the time involved in this action to the sum of $1.73 per barrel. The plaintiff offered no evidence to the contrary. There is no evidence that the price of that cement at that point during that period of time was more than $1.73 per barrel.

The appellant contends that the price of that cement fixed by the Monolith Portland Cement Company, and the purchase of two carloads from the Yosemite Cement Company at $1.71, during that period of time, does not furnish evidence of a reduction of the market value thereof. It is further asserted that the Monolith Portland Cement Company was an unsuccessful bidder on the contract for cement with the defendant and that its reduced schedule of prices was fraudulent and uncontrolling.

[2-4] We may assume that the Monolith Portland Cement Company was one of the unsuccessful bidders among several others for the contract with the defendant. That circumstance, however, furnishes no substantial evidence of fraud. There was no effort to prove that this schedule of prices was fraudulent. It is true there may be a great difference between the true market value of a commodity and the mere market price thereof. 38 C.J. 1261, §§ 16–18. It is also true that a stimulated market price, created by artificial or fraudulent practices, will not establish the true value or price thereof. McGarry v. Superior Portland Cement Co., 95 Wash. 412, 163 P. 928, Ann.Cas.1918A, 572, note; Paxton & Gallagher Co. v. Pellish, 43 Wyo. 182, 299 P. 708. In the present case there is no evidence of either stimulated or fraudulent fixing of the price of cement. We are of the opinion the reduction of the market value, as distinguished from the market price of cement, is not involved in this case. The contract specifically states that "should the price per barrel of Tufa Cement, on the open market during the life of this contract, be reduced * * * The Modesto Irrigation District shall have the benefit of such reduction." Apparently the price of Tufa cement to all prospective purchasers at that locality was reduced to $1.73 per barrel by a leading firm. This reduction of price was recognized by the Yosemite Cement Company, and also by the plaintiff in accepting payment in full for certain shipments at that rate. That is substantial evidence of a reduction of the price. The stipulated reduction of price "on the open market" merely means that the commodity might be purchased in fair trade on the market at a lower price than the figure which is stated in the contract. It is said in 38 Corpus Juris p. 1261, § 16: "The term 'market price' implies price or value in an open market, and that as between one who desires, but is not compelled, to buy, and one who is willing, but not compelled to sell."

[5] The case of McGarry v. Superior Portland Cement Co., supra, is unfavorable to this appellant, upon facts similar to the present case. The syllabus of that case correctly states the ground upon which that case was decided, as follows: "As 'market price' has no hard and fast meaning, and, * * * where plaintiff contractor purchased cement at a stated price per barrel under an agreement that he was to have a reduction or rebate if the market price fell below that named while deliveries were being made to him, and later the defendant quoted a lower price to the county for county roads for the advantage of contractors generally, the quotation to the county, without limitation as to quantity for the benefit of those engaged in the same kind of work as plaintiff, was a reduction in market price which entitled plaintiff to a rebate."

In the present case a reputable leading cement industry not only quoted to the defendant a reduced price of the identical kind of cement, but it also issued a printed schedule of prices offering to sell that cement to any one who desired to purchase it at that reduced price. In the absence of evidence to the contrary, we are of the opinion that furnishes substantial evidence of a reduced price on the commodity on the open market.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

---

23 Cal.App.2d 202

PASSANTINO et ux. v. AMERICAN TRUST CO.

Civ. 10562.

District Court of Appeal, First District, Division 2, California.

Oct. 19, 1937.

1. Deeds 🔑109

Evidence that, when deed was executed bearing, as name of grantee, name borne by both father and son, and when trust deed was signed by mark and delivered, father and son were both residing on land, that son could write his name while father could not, that son remained on land less than one year and did not interfere when father, who remained until his death, managed farm, paid taxes and interest, collected fire insur-

ance on building, and conducted litigation concerning land, supported finding that father was grantee intended on execution of deed.

2. Quieting title ⚿44(3)

In action involving title to realty, wherein defendant denied plaintiffs' claims of title and right to possession and pleaded laches, evidence supported findings for defendant.

3. Adverse possession ⚿85(4)

Evidence that father, while in possession of realty, brought action against well digger for breach of contract to sink well, that son asserted no title to realty, that son witnessed father's signature to notes secured by trust deed on realty, and that son knew of father's death, but brought no action against party claiming through father until approximately 3 years thereafter, established that father's "possession" was "adverse" to son (Code Civ.Proc. §§ 318-320).

[Ed. Note.—For other definitions of "Adverse Possession," see Words & Phrases.]

◆

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by Francisco Passantino and wife against the American Trust Company, wherein defendant filed a cross-complaint. From a judgment for defendant, plaintiffs appeal.

Affirmed.

John Barton O'Brien, of San Francisco, for appellants.

Henry E. Monroe, Julia M. Easley, and Brobeck, Phleger & Harrison, all of San Francisco, for respondent.

STURTEVANT, Justice.

Plaintiffs, Francisco Passantino and Rosa, his wife, have appealed from a judgment in favor of the defendant quieting title to certain lands in Monterey county. In their complaint the plaintiffs claimed to be the owners and entitled to possession. In its answer the defendant denied such claims and pleaded the laches of the plaintiffs and also certain statutes of limitation. It also filed a cross-complaint. In the latter pleading it set forth that heretofore it was the owner of a certain promissory note the payment of which was secured by a deed of trust, that a default occurred in the payment of said promissory note, the deed of trust was foreclosed, and that the defendant purchased the property at the foreclosure sale and ever since has been and is now the owner thereof.

The controversy arises out of the following facts: Francisco Passantino, hereinafter referred to as Francisco Passantino, Sr., was born in Italy. While residing in that country he married Antonia Balistreri. To them a son was born, this plaintiff, and who will hereinafter be called Francisco Passantino, Jr. While the plaintiff was a small child his father came to this country. He entered under the name of Guitano Balistreri and under the same name on January 23, 1891, he was naturalized. Soon after he arrived in America the father went to Santa Clara county and commenced to farm and continued in that occupation down to the time of his death. At the places where he resided he was known under both of the above-mentioned names. The plaintiff at about the age of ten came to this country and at once went to where his father was residing. At all times the plaintiff went under his true name. The plaintiff learned to read and write. When his father was naturalized he signed his name by making his mark. Whether he later became able to write his name is a controverted fact in the case.

[1] Francisco Passantino, Sr., acquired two different parcels of land in Monterey county. One contained 10 acres and the other contained 53.40 acres. Both parcels were claimed by the plaintiff in his original complaint, but later he dismissed as to the 10-acre tract, and the larger tract only is now involved in this action. The latter tract was formerly owned by Ralph Lowe. In 1902 he leased it to F. Balistreri & Co. At that time the father was known by both names, as hereinabove mentioned. On August 26, 1904, Ralph Lowe made a deed of said tract to Francisco Passantino. It is upon the identity of the grantee intended by that deed that this whole action rests. This plaintiff claims he was the grantee. The defendant claims Francisco Passantino, Sr., was the grantee intended. That was a question of fact and the trial court found the plaintiffs never had any interest in said property or any part thereof. There was some indirect evidence for and against the contention of each party. The trial court adopted that in favor of the defendant. We may not say there was no evidence to support that finding. At the time Lowe executed his deed, a deed of trust was executed by Francisco Passantino

to Lowe. It was signed by a mark. Francisco Passantino, Jr., and his father were both on the land at that time. The plaintiff remained less than one year. His father continued to occupy it until his death in 1931. He paid the taxes and the interest. When a certain insured building burned, the father collected the insurance. Litigation arising over the management and improvement of the property was conducted by the father. He farmed the ground and built buildings thereon. He harvested the crops and marketed them. Whereas, during that entire time, although the plaintiff knew what his father was doing, he did not interfere nor did he do or participate in doing any of said acts. Another significant set of circumstances is this: August 26, 1904, the deed of trust was executed to Lowe. The father could not write his name. The son could write his name when he came to this country. That deed was signed by a mark. In 1906 the father, for the purpose of clearing the title, conveyed to L. S. Cavallero. The latter reconveyed to Francisco Passantino, Sr., and thereafter all conveyances were made so describing the father.

[2] It was the claim of the plaintiffs that Lowe's deed was made to Passantino, Jr., as grantee; that he intrusted the care and management of the property to his father in 1905, who agreed to care for and manage it, pay the taxes, and attend to repairs. Continuing, they claimed they had never encumbered the property nor authorized any encumbrance. As stated above, the defendant pleaded the laches of the plaintiffs. The trial court found in favor of the defendant. It will be conceded at once there was a conflict in some of the evidence. However, there was ample evidence to support the findings of the trial court.

[3] The trial court found that the plaintiffs' action was barred by the provisions of sections 318, 319, and 320 of the Code of Civil Procedure. The plaintiffs contend the possession of Francisco Passantino, Sr., was not adverse, hence their action was not barred. The vice in that contention is the claim that there was no evidence such holding was adverse. There was clear evidence to that effect. In 1914 Francisco Passantino, Sr., brought an action against a well digger for breach of contract to sink a well on the property in suit. His son was present and never asserted his title to the land. The father signed notes to borrow moneys under the deed of trust above mentioned. His son, one of the plaintiffs, signed his name on the notes as a witness to his father's signature. He knew of his father's death in 1931, but no action was brought until March, 1934. This additional finding was likewise supported by the evidence.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

23 Cal.App.2d 107

McCLELLAND v. SHAW et al.

Civ. 2021.

District Court of Appeal, Fourth District, California.

Oct. 7, 1937.

1. Appeal and error ⊂⇒225

Where defects in affidavit in support of motion to issue execution after lapse of five years from entry of judgment were not pressed in court below and defects were cured by other affidavits used at hearing without objection, defect was cured and defendants could not challenge sufficiency of supporting affidavit on appeal (Code Civ. Proc. § 685, as amended by St.1933, p. 2499).

2. Appeal and error ⊂⇒983(3)
Execution ⊂⇒73

The granting or denying of motion to issue execution after lapse of five years from entry of judgment is within trial court's sound discretion, and its decision will not be reversed except for clear abuse of such discretion (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

3. Equity ⊂⇒72(1)

"Laches," in legal significance, is not mere delay but delay that works a disadvantage to another.

[Ed. Note.—For other definitions of "Laches," see Words & Phrases.]

4. Execution ⊂⇒73

Defendant's possession of property during five-year period following entry of judgment out of which judgment might have been satisfied did not authorize refusal to order issuance of execution after lapse of five years (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

5. Execution 🔑73

Where attachment is issued and levied on property of defendant at time action is instituted, that execution was not issued and attached property sold to satisfy the judgment is not sufficient to justify denial of motion to issue execution after lapse of five years (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

6. Equity 🔑72(1)

The doctrine of "laches" is not designed to punish a plaintiff, and can be invoked only where to allow a claim would, because of claimant's own acts, permit an unwarranted injustice.

7. Execution 🔑73

Judgment debtor's equity in property which was encumbered in amount several thousand dollars in excess of judgment, such equity being available to judgment creditor only after he had satisfied the encumbrance, was not sufficient to deprive judgment creditor of right to enforce judgment after lapse of five years from entry of judgment (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

8. Execution 🔑73

Judgment debtors' allegation that actions filed by local creditors, coupled with certain mortgage foreclosures, so injured debtors' credit that continuance of business was rendered impossible, did not authorize denial of execution after lapse of five years after entry of judgment on ground that delay in issuance of execution had caused such change, since such loss of credit was not due to failure to issue execution but was due to filing of the actions (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Proceeding by Mark A. McClelland against O. N. Shaw and another. From an order denying plaintiff's motion to issue execution after the lapse of five years from entry of judgment, plaintiff appeals.

Reversed.

Harry W. Horton and George R. Kirk, both of El Centro, for appellant.

A. C. Finney, of El Centro, for respondents.

MARKS, Justice.

This is an appeal from an order denying plaintiff's motion to issue execution after the lapse of five years from the entry of judgment.

On August 8, 1930, in the superior court of Imperial county, plaintiff was given default judgment against defendants in the sum of $1,171.11 and $19 costs. On September 28, 1931, execution on the judgment was issued to the sheriff of Los Angeles county and was returned wholly unsatisfied. On May 15, 1936, plaintiff filed a notice of motion, supported by his affidavit, to the effect that on May 22, 1936, he would move the court for an order directing the issuance of execution against both defendants. Further affidavits were filed by both parties which were used on the hearing of the motion. It was denied, and this appeal followed.

Section 685 of the Code of Civil Procedure (as amended by St.1933, p. 2499) requires the affidavit supporting the motion to set "forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion."

A reading of the supporting affidavit leads to the conclusion that it does not satisfactorily set forth the reasons for the failure to comply with the provisions of section 681 of the Code of Civil Procedure. Defendants demurred to its sufficiency on that ground. It does not appear from the record that this objection was pressed in the court below. From the affidavits subsequently filed it sufficiently appears that neither defendant had any property subject to execution within five years after the entry of judgment which is now urged as the reason why they were not further pursued by means of the writ.

[1] The motion was heard and decided upon all the affidavits filed. These affidavits sufficiently set forth the reason for plaintiff's noncompliance with the statute. As the defects in the supporting affidavit were not pressed in the court below, as far as the record shows, and as these defects were cured by other affidavits used at the hearing without objection, in so far as the record shows, the defect was cured and defendants should not now be permitted to seriously challenge here the sufficiency of the supporting affidavit.

[2] It is thoroughly settled that granting or denying a motion to issue execution after a lapse of five years from the entry of judgment is a matter within the sound discretion of the trial court and that its decision will not be reversed on appeal except for a clear abuse of such discretion. Wheeler v. Eldred, 121 Cal. 28, 53 P. 431, 66 Am.St.Rep. 20; Wheeler v. Eldred, 137 Cal. 37, 69 P. 619; Doehla v. Phillips, 151 Cal. 488, 91 P. 330; Weldon v. Rogers, 159 Cal. 700, 115 P. 464; Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334; Radonich v. Radonich, 130 Cal.App. 250, 20 P.(2d) 51; Faias v. Superior Court, 133 Cal.App. 525, 24 P.(2d) 567; Mohr v. Riccomi, 14 Cal.App.(2d) 416, 58 P.(2d) 659.

[3] The sole question for our decision is whether or not the trial judge abused his discretion in refusing to grant the motion to issue the execution. A similar question was before the court in the case of Demens v. Huene, 89 Cal.App. 748, 265 P. 389, 391, where the trial court had first ordered execution to issue and then granted defendant's motion to vacate that order. The second order was before the appellate court for review and was reversed because it was a clear abuse of the sound discretion vested in the trial judge. The judgment was rendered on June 24, 1915. The motion to issue execution was made on February 11, 1924. In discussing the question of abuse of discretion it was said:

"The affidavit of the defendant Clara A. Huene states that she and her husband, judgment debtors, were engaged in conducting rooming-houses for many years, and that up until November, 1919, she owned and possessed ample personal property consisting of furniture and leases in and of several apartment houses for varying periods in Los Angeles to have satisfied the judgment through execution, but that no effort was made to levy execution and no demand for payment was made; that up to such date plaintiff knew the above facts and knew or had means of knowing affiant's whereabouts. The affidavit of the defendant E. A. Huene states that he lived in Los Angeles June 24, 1915, and continually thereafter until June, 1918, during which time he possessed an automobile, well worth the amount of the judgment, which he used openly on the streets of Los Angeles, and that plaintiff knew or had means of knowing it; that no attempt to levy was made prior to January 30, 1924. Counter affidavits were filed by plaintiff, but for the purpose of determining whether or not there has been an abuse of discretion it will be taken that these are the true facts. 'It is true, as claimed by the learned counsel for the respondents, that orders like the present, in legal parlance, rest very much in the discretion of the court below, and will not be disturbed by this court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion. (Citing authorities.) The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other.' Bailey v. Taaffe, 29 Cal. 422, 423, 424.

"It is the intent of the law, and it would seem the intent, as well, of good morals, that everyone being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case is provided for by law. There must, then, be something added to the mere fact of the expiration of the time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute. Section 685 of the Code of Civil Procedure. As was said in Hovey v. Bradbury, 112 Cal. 620, at page 625 (44 P. 1077, 1078): 'Nor, when we come to view plaintiff's conduct generally, can there be seen any act or omission upon his part which would justify so stern a treatment of his claim as its rejection under the doctrine of laches. That doctrine, as has been said, is neither technical nor arbitrary. It is not designed to punish a plaintiff. It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent,'

"And in Carr v. Sacramento C. P. Co., 35 Cal.App. 439, 170 P. 446: 'Laches in legal significance is not mere delay, but delay that works a disadvantage to another.' See, also, Cahill v. Superior Court, 145 Cal. 42, 78 P. 467, and McGibbon v. Schmidt, 172 Cal. 70, 155 P. 460.

"What are the circumstances, then, which could justly move the lower court to deny the benefit of this statute to the plaintiff? We are at a loss to find any."

The record discloses the following facts most favorable to the cause of defendants: The complaint sought recovery of a balance of $1,171.11 for labor and goods, wares, merchandise, lumber, and cement furnished defendants. It was filed May 27, 1930. Defendants appeared by demurrer and failed to answer after their demurrer was overruled. Judgment was entered August 8, 1930. An attachment was issued May 27, 1930, and returned June 6, 1930. The sheriff attached tracts 74 and 88, township 14 south, range 15 east, S. B. M., in Imperial county. Tract 74 was worth approximately $20,000, and was encumbered for approximately $8,800. At the time of the commencement of this action defendants were owners of more than 10,000 sheep of unstated value and other personal property of the value of about $4,000. The sheep were encumbered by a chattel mortgage of more than $200,000. At about the time plaintiff started his action several other local creditors started other actions in Imperial county. The Chicago Live Stock Company held the chattel mortgage on the sheep and was furnishing money with which to finance defendants' operations of buying, fattening, and selling sheep. When the several actions were filed by local creditors in Imperial county the Chicago Live Stock Company refused to advance defendants further money and foreclosed its mortgages, taking all of defendants' property at a great loss to them. The suits by the local creditors are listed as follows: Morse v. Shaw Bros. for $790.34, filed May 20, 1930; Phillips v. Shaw Bros. for $2,360 (date of filing not given, but number indicates filing earlier than McClelland case); McClelland v. Shaw Bros. for $1,171.11, filed May 27, 1930; Gray v. Shaw Bros., for $451.75, filed August 5, 1930. The mortgage on tract number 74 was foreclosed and the property bid in at foreclosure sale for $11,268.75. Plaintiff took no steps to enforce the lien of his judgment on tract number 74 or collect the judgment out of the excess of the value of the property over the mortgage or the amount for which it was sold at foreclosure sale. It is also stated in the affidavit of I. H. Shaw that "this defendant has never had or acquired any property whatever since the entry of the judgment in this action, and neither of the defendants now have or possess any money or property of any kind out of which said judgment can be paid or satisfied, in whole or in part."

Two grounds are stated in the affidavits and urged here, upon which it is argued that the sound discretion of the trial judge must have rested in denying the motion for issuance of the execution. They are: (1) That tract number 74, which was attached when this action was filed, had a value of $11,200 over the mortgage and a value of $8,731.25 over the amount for which it was sold at foreclosure sale out of which plaintiff should have satisfied his judgment; (2) that the bringing of the suits by the local creditors in Imperial county impaired and destroyed the credit of defendants so that they received no further advancements by the Chicago Live Stock Company; that these suits caused the holders of the mortgages on their real and personal property to foreclose their liens, causing the bankruptcy of defendants and the loss to them of $25,000, the net value of their properties over the liens upon them.

[4-6] It has been held that where it is shown that defendants had property during the five-year period following the entry of judgment out of which the judgment might have been satisfied furnishes no ground for refusal of the trial court to order issuance of execution after the lapse of five years. Demens v. Huene, supra. It also has been held that, where an attachment was issued and levied on property of defendant at the time the action was instituted and execution was not issued and the attached property was not sold to satisfy the judgment, this is not sufficient reason for denial of the motion to issue

execution after the lapse of five years. Water Supply Co. v. Sarnow, 6 Cal.App. 586, 92 P. 667. In Palace Hotel Co. v. Crist, 6 Cal.App.(2d) 690, 45 P.(2d) 415, 417, it was urged that during the twenty years elapsing between the entry of judgment and the motion for issuance of execution defendant had property out of which the judgment could have been satisfied and that it was inequitable and unjust to permit execution to issue after the lapse of so long a time. In disposing of this contention the District Court of Appeal said:

> "It is further urged that, as approximately twenty years had elapsed from the rendition of the former judgment and application to the court to enforce it, that for many years the defendant owned real estate out of which the judgment could have been satisfied, * * * [that] such a situation constituted laches, which should bar a recovery on the part of the plaintiff. * * * In Demens v. Huene, 89 Cal.App. 748, 265 P. 389, where execution had been issued on order of the trial court, and the court subsequently recalled the execution because a period of nine years had elapsed from the date of the judgment and the making of the order directing the issuance of execution and the further ground that for a period of five years after the judgment had been entered the debtors had property upon which execution could have been levied, the appellate court held that the recalling of the execution was an abuse of discretion. It is said at page 754 of 89 Cal.App., 265 P. 389, 391, of the case last cited, quoting from Hovey v. Bradbury, 112 Cal. 620, at page 625, 44 P. 1077, concerning the doctrine of laches: 'It is not designed to punish a plaintiff. It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent.' We think it is clear that the doctrine of laches has no application here and that the trial court did not abuse its discretion in permitting the enforcement of the original judgment."

[7] The mere fact that defendants had an equity in property that was encumbered in an amount of several thousand dollars in excess of plaintiff's judgment, which equity was only available to plaintiff after he had satisfied the encumbrance, should not be held to deprive plaintiff of his right to enforce his judgment after the lapse of five years from the entry of judgment.

[8] The second argument of defendants to the effect that the actions filed by the local creditors so injured their credit that they could not continue their business, and their mortgages were foreclosed causing a loss to them of $25,000, bears a resemblance to the equitable doctrine of laches in that it is urged that the delay in the issuance of the writ of execution has caused such change in the position of defendants that it would be inequitable or unjust to permit it to issue after the lapse of the statutory period of five years. See 11 Cal.Jur. 51. We can see nothing in the record upon which to base such an argument. The loss of credit was not due to the failure to issue execution within five years but to the filing of the suits. The same is true of the foreclosure proceedings. Defendants' credit had been impaired and their property lost by foreclosure long before the lapse of the five years. There can be no causal connection between the loss of credit and the institution of the foreclosure proceedings and the failure to issue execution. The affidavits of defendants clearly lay the blame for their losses to the filing of the suits and not the failure to issue the execution. The failure to issue the execution within five years caused no shown loss to them or change in their position that would furnish any sound ground for a denial of the motion to issue the execution.

There is but one case that we have found that seems to conflict with the views we have expressed and the conclusions we have reached. Williams v. Goodin, 17 Cal.App.(2d) 62, 61 P.(2d) 507. We are not prepared to say that there is an actual conflict because we have not examined the record in that case. There is a vigorous and logical dissenting opinion which is in accord with what our study has led us to believe is the established rule of law governing a case of this kind. We conclude that in the instant case there was nothing presented to the trial judge which justified the exercise of his sound discretion which resulted in his denying the motion of plaintiff under consideration here.

The order appealed from is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

BROWN v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 11472.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1937.

Rehearing Granted Oct. 21, 1937.

1. Divorce 🔑239

Where superior court entered order in divorce suit ordering husband to pay wife a stated weekly sum as alimony, but providing that such payment should not be in addition to payment of same weekly sum agreed to be paid by husband in property settlement agreement, it could not be said that order was made in absence of knowledge of husband's ability to pay, since court had proper knowledge of agreement and could, and probably did, infer that husband, having agreed to pay, was able to pay.

2. Divorce 🔑240(3)

Evidence that husband was receiving between $100 and $150 per month as city attorney and received additional sums for examination and approval of bond issues, received additional income from general private law practice, recently purchased a new automobile, and owned a ranch, supported finding that husband was able to pay $30 per week to his divorced wife as alimony.

3. Prohibition 🔑5(3)

Where issue of husband's ability to pay alimony to his divorced wife was determined upon conflicting evidence in proceedings for contempt for failure to comply with order for payment, prohibition was not available to review findings or judgment.

◆

Petition by Burr A. Brown for a writ of prohibition against the Superior Court of Los Angeles County, Hon. Fred. Miller, Judge, and another, wherein an alternative writ was issued.

Alternative writ discharged, and writ denied.

Burr A. Brown, of Encinitas, in pro. per.

Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, and Mark L. Taylor, of Long Beach, for respondents.

DORAN, Justice.

In this petition for a writ of prohibition to prevent the superior court from punishing petitioner herein for contempt for failure to comply with an order of the court for the payment of alimony, said petitioner contends, in substance, that there can be no contempt for the failure to comply with the order because: First, such order embraces only the approval of a property settlement agreement and is not an order for the payment of alimony based upon a preliminary hearing as to petitioner's ability to pay; and, second, that the evidence heard upon the examination of the petitioner at the hearing on the contempt proceedings conclusively shows that at no time since the signing of such order for the payment of alimony has the petitioner had the financial ability to comply with the same. An alternative writ was issued on such petition.

It appears from the record herein that petitioner was the defendant in an action for divorce, in connection with which a property settlement agreement was executed by the parties; that the interlocutory judgment in said action, dated February 17, 1932, following the default of defendant, provided as follows: "It is further Ordered, Adjudged and Decreed that that certain Property Settlement Agreement of the date of January 14, 1932, between Burr A. Brown and Elma L. Brown, parties to this action, be, and the same is hereby ratified, confirmed and approved; It is further Ordered, Adjudged and Decreed that Defendant pay to Plaintiff the sum of Thirty Dollars ($30.00) United States Legal Tender per week on Monday of each week beginning February 22, 1932, during and for the lifetime of plaintiff; provided, however, that payment by defendant to plaintiff of said sum of Thirty Dollars ($30.00) per week during and for the lifetime of plaintiff shall not be in addition to the payment of the Thirty Dollars ($30.00) per week which defendant has agreed to pay to plaintiff in accordance with the terms of said Property Settlement Agreement of date of January 14, 1932, between the parties to this action."

[1] It will be seen from the foregoing that, although reference is made in the court order to the property settlement agreement, nevertheless the order for the payment of the alimony is unqualified and, in effect, is independent of any reference to the property settlement agreement. In re Leet, 99 Cal.App. 788, 279 P. 466, and

other cases relied upon by petitioner, are not in point, and therefore furnish no authority in support of petitioner's contention that the order in question constituted merely an approval of a property settlement agreement. It is not disputed by petitioner that the property settlement agreement was executed, but—if petitioner's argument is understood—it is urged that the order for the payment of alimony is invalid because it was decreed in the absence of evidence of the defendant's (petitioner's) ability to pay. In this connection, it appears that at the time the original order for the payment of alimony was made the court had proper knowledge of the property settlement agreement. It cannot be said, therefore, that the order was made in the absence of knowledge of the defendant's ability to pay, for the court could, and probably did, infer that the defendant, having agreed to pay, had the ability to pay.

[2] The claim that petitioner was adjudged guilty of contempt "notwithstanding the uncontradicted testimony of petitioner as to his inability to make the payments under said Order," as well as the further claim that it was conclusively shown that at no time since the signing of the order for the payment of alimony has petitioner had the ability to pay, lacks support in the record. In this connection it should be noted that respondents' answer to the petition herein for an alternative writ of prohibition alleges, in substance, that at the hearing on the order to show cause Elma L. Brown, the former wife of petitioner, upon whose affidavit the order to show cause was issued, testified that petitioner was receiving between $100 and $150 per month as city attorney of the city of Seal Beach and received additional sums from said city for the examination and approval of bond issues; that in addition thereto he received his income from the general private practice of law; that petitioner had recently purchased a new Dodge automobile; that at said hearing petitioner himself testified that the expenses sought to be deducted included taxes and expenses of operating petitioner's ranch and the support of his present wife and family, and that some months his income was far in excess of $200 per month; also, that he was the owner of a ranch located in the county of San Diego. Petitioner herein made no reply to the aforesaid answer.

The situation in the instant case is analogous to the case of Bailey v. Superior Court, 215 Cal. 548, 11 P.(2d) 865, wherein the court held the evidence to be sufficient to support the finding of ability to pay.

[3] From the limited record presented in connection with the petition herein for a writ of prohibition, it is evident that in the contempt proceedings the issue as to petitioner's ability to pay was determined upon conflicting evidence, under which circumstances prohibition is not available for the purpose of reviewing the findings or judgment.

For the foregoing reasons, the alternative writ of prohibition heretofore issued is discharged and a writ of prohibition is denied.

I concur: YORK, Acting P. J.

---

23 Cal.App.2d 9

SWAYNE & HOYT, Limited, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 11550.

District Court of Appeal, Second District, Division 1, California.

Sept. 30, 1937.

Exceptions, bill of 🔑39(1)

A bill of exceptions to review a ruling on motion for change of venue which was not presented within 10 days as required by statute was not filed too late, notwithstanding ruling on motion was appealable, where proposed bill was filed within time fixed by statute allowing a party 20 days after service of notice of entry of judgment in which to prepare a proposed bill of exceptions, where trial has been had on a question of fact (Code Civ.Proc. §§ 649, 650, 963).

Proceeding by Swayne & Hoyt, Limited, for a writ of mandate directed to the Superior Court of the State of California, in and for the County of Los Angeles, and the Honorable Fred Miller, a judge thereof.

Decree in accordance with opinion.

Lasher B. Gallagher, of Los Angeles, for petitioner.

Herbert R. Lande, of San Pedro, for respondents.

HOUSER, Presiding Justice.

In the course of proceedings in the lower court in which the petitioner herein was the defendant, a motion that was made by the latter for a change of venue having been denied by the court, eleven days thereafter the said defendant "presented to the court" its bill of exceptions affecting such order of denial of said motion, and requested that said bill be settled. The plaintiff in the action objected to the settlement thereof on the ground that the proposed bill was filed too late; which objection was sustained, with the result that ever since that time the lower court has refused to settle said bill. At the instance of the defendant in the action, this court issued its alternative writ of mandate by which the lower court was directed to settle said bill, or, at a stated date, to show cause why it had not done so. The demurrer and the answer of respondents to said writ having been filed herein the question of law therein involved is now ready for determination by this court.

When, in 1872, the Code of Civil Procedure of this state was enacted, as far as concerns the instant matter, section 649 of said Code contained a provision to the effect that a bill of exceptions "to any decision" thereafter made by the court might be presented for settlement "at any time" after such decision was made. In the case of Tregambo v. Comanche M. & M. Co., 57 Cal. 501, among other things, it was held that under the provisions of section 649 of the Code of Civil Procedure, it was not necessary to immediately present a proposed bill of exceptions to a decision by the court by which a motion to open a default was denied, but that such bill might be presented for settlement in accordance with the provisions of section 650 of the Code of Civil Procedure; and since the date of the decision in that case, in principle it has been followed in Pfister v. Wade, 59 Cal. 273; Flagg v. Puterbaugh, 98 Cal. 134, 32 P. 863, and Turner v. Hearst, 115 Cal. 394, 47 P. 129. But in Estate of Scott, 128 Cal. 578, 61 P. 98, it was held that (syllabus) "section 649 of the Code of Civil Procedure contemplates the settlement of a bill of exceptions to a decision made in the progress of a trial at the time the decision is made, during the trial, and in the presence of the counsel for both parties, and does not contemplate a settlement of the bill after the adjournment of the court, and without any notice to the adverse counsel. Section 650 of that code makes ample provision for the settlement of a bill of exceptions after the trial upon notice to the adverse party." See, also, Estate of Carpenter, 127 Cal. 582, 60 P. 162, and McCarty v. Wilson, 2 Cal.App. 154, 83 P. 170. However, since such decisions were made, section 649 of the Code of Civil Procedure has been variously amended, with the result that as far as concerns the time within which a bill of exceptions now may be presented, instead of the uncertainty which formerly prevailed in that regard, the statutory language is that the bill "must be presented within ten days after written notice of making such decision." In that connection, although by the affidavits of the respective parties, a conflict appears regarding the fact of whether "written notice of making of such decision" was waived, the language contained within the clerk's minutes of the matter when it came on for hearing is clearly susceptible of the construction that in open court the defendant did waive the giving of notice, as is asserted by the respondents herein. And in view of the preponderance of evidence as it thus appears, this court will assume the fact to be established in accordance with respondents' contention in that regard. Such being the situation, in accord with general authority, it would seem inescapable that as hereinbefore has been indicated, the petitioner herein, not having presented for settlement its proposed bill of exceptions within the statutory ten days, as far as the provisions of section 649 of the Code of Civil Procedure were applicable, the objection to the settlement of the proposed bill was well taken. Estate of Janota, 124 Cal.App. 238, 12 P.(2d) 163; Mulcahy v. Young, 58 Cal.App. 382, 208 P. 321; Woodard v. Superior Court, 76 Cal.App. 366, 244 P. 953; Gamache v. Budd, 129 Cal. 554, 62 P. 105. As a result of such considerations, unless under the provisions of section 650 of the Code of Civil Procedure, the defendant was entitled to present to the court its proposed bill of exceptions for settlement, it should follow that the writ hereinbefore directed by this court to issue should be discharged.

In that regard, the pertinent language of section 650 of the Code of Civil Procedure is that "where a trial shall have been had on a question of fact, and a party desires to have exceptions taken at such trial settled in a bill of exceptions, he may, at any time thereafter, and within twenty (20) days after service upon him of written notice of the entry of the judgment * * * prepare the draft of a bill and serve the same, or a copy thereof, upon the adverse party."

Notwithstanding the patent fact that by the terms of said statute, the right to have a bill of exceptions settled thereunder arises only "where a trial shall have been had on a question of fact," and that ordinarily it well might be questioned whether a ruling on a motion for change of venue (which in itself, by the provisions of section 963 of the Code of Civil Procedure is made appealable), may be considered as falling within the purview of section 650 of the Code of Civil Procedure, it is noted that in the case of Flagg v. Puterbaugh, 98 Cal. 134, 32 P. 863 (expanding the rule announced in Tregambo v. Comanche M. & M. Co., 57 Cal. 501), it was held that even the fact that an order to which an exception is taken by the aggrieved party is by statutory provision made appealable, does not limit the right to a settlement of a bill of exceptions affecting such order to that prescribed by section 649 of the Code of Civil Procedure; but that the appealing party also is entitled to the rights with reference thereto that are conferred by the provisions contained in section 650 of the Code of Civil Procedure, which, inter alia, include an enlargement of the time within which a bill of exceptions may be served "upon the adverse party," to wit, twenty days. To the same effect, but as affecting a nonappealable order only, is Tregambo v. Comanche M. & M. Co., 57 Cal. 501. See, also, Pfister v. Wade, 59 Cal. 273, and Turner v. Hearst, 115 Cal. 394, 47 P. 129.

In reliance upon the correctness of the ruling as disclosed by such authority, it becomes obvious that the presentation for settlement by the defendant in the action of its proposed bill of exceptions in less than twenty days after the decision was made on his motion for change of venue, to wit, on the eleventh day thereafter, was well within the time limited by the terms of the statute. It follows that the trial court should be, and it is, directed to settle said bill of exceptions in accord with the provisions of section 650 and other pertinent provisions of the Code of Civil Procedure.

We concur: YORK, J.; DORAN, J.

23 Cal.App.2d 116

PEOPLE v. DAVIDSON.

Cr. 2999.

District Court of Appeal, Second District, Division 1, California.

Oct. 8, 1937.

Hearing Denied by Supreme Court Nov. 3, 1937.

1. Criminal law 🔑863(2)

Where jury returned from deliberations for further instructions as to evidence suggesting that prosecutrix in rape case may have had illicit relations with others, instruction that jury should not speculate as to such relations, inasmuch as accused could have asked prosecutrix concerning such relations under evidence showing its possibility but did not, was proper, although evidence showing possibility was introduced after prosecutrix testified, since accused could have recalled prosecutrix for further cross-examination.

2. Criminal law 🔑1037(2)

Where improper remarks to jury by district attorney were of such a nature that their effect could have been cured by proper instructions, defendant failing to request such instructions was not entitled to reversal.

3. Rape 🔑52(1)

Evidence *held* to sustain conviction for rape on a fifteen year old girl.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

A. B. C. Davidson was convicted of rape, and he appeals.

Affirmed.

Mark F. Jones, of Los Angeles (W. L. Engelhardt and Gilbert B. Hughes, both of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the people.

DORAN, Justice.

Appellant, charged in an information filed by the district attorney with the crime of rape committed February 27, 1937, on a fifteen year old girl, was convicted by a jury and sentenced to one year in the county jail. He appeals from the judgment and from an order denying a motion for a new trial.

Briefly, the evidence supports the following statement of facts: Since their marriage in 1929, appellant and his wife, and her two daughters by a former marriage, had made their home together in Los Angeles. The two stepdaughters of appellant, Jane and Garnet, at the time of the alleged offense, were aged fifteen and fourteen years, respectively.

On the night of February 27, 1937, defendant, appellant herein, after a late dinner, lay down on the davenport in his living room and went to sleep. His wife tried to awaken him when she went to bed, but failed to do so, and she told her daughter Jane to be sure and awaken him before she went to bed. Jane endeavored to do so but could not arouse him and she, too, went on to bed. Later, a little after 12 o'clock, Jane got up and went back into the living room and succeeded in awakening defendant. They talked for a few minutes and then defendant suggested that they go somewhere to eat. She put on her shoes and stockings and a long coat over her pajamas and they drove away in their automobile. According to Jane, she remonstrated with her stepfather about their not getting something to eat and her stepfather replied that there was no hurry and he continued driving, whereupon Jane fell asleep. When she awoke they were out in the hills with no houses in sight. It is at this point that the alleged act of sexual intercourse took place on the back seat of the automobile. Jane said nothing regarding the occurrence until about March 15, 1937, when, in a heated argument with her stepfather in which she claimed he was persecuting her in connection with his continued criticisms of her delay, at various times, in getting home from school, she told him that if he did not keep out of the matter she would tell her mother about him, whereupon he undertook to chastise her with a "clothes stick." Jane's testimony regarding this was as follows: "I wanted to tell my mother, and he said he wouldn't let me alone with my mother, and then I said I would tell her right in front of him and then he started after me." At that point her mother appeared on the scene and told the defendant to leave Jane alone. In addition to the act of sexual intercourse upon which the offense is based, Jane testified that the defendant had been having sexual relations with her for about three years.

Dr. Gray, the examining physician of Juvenile Hall, testified that she made a physical examination of Jane on March 17, 1937, and found "the hymen ruptured and relaxed," indicating that "she probably had had sexual intercourse many times."

It is contended by appellant that the "testimony of the prosecutrix is highly improbable," but in that connection appellant does not contend that her testimony is not sufficient, as a matter of law, to support the verdict. For example, appellant's brief contains the following statement: "In discussing the testimony of the prosecutrix briefly, we are doing so merely for the purpose of pointing out more particularly its weaknesses and inconsistencies, and not with any contention that it is not sufficient as a matter of law to support the verdict of the jury." It is urged by appellant that the improbability of the testimony of the prosecutrix becomes important when considered in connection with the alleged misconduct of the district attorney and the alleged erroneous advice given by the court to the jury; in other words, that the alleged misconduct of the district attorney and the erroneous advice given by the court were especially prejudicial because of the inherent improbability of the testimony of the prosecutrix.

[1] With regard to the claim that the court's advice to the jury was prejudicial, the record shows that, after having deliberated for a short time, the jury returned to the court for further instructions and informed the court that "There seems to be a question that there might have been others involved in affairs with this girl that have not been brought to light." To this the court replied: "There is nothing to indicate that any other person has been named or suspected. There is nothing to indicate that any other person has had any connection with this case, as far as the evidence is concerned. If such a thing exists it has been kept entirely secret from all of us." And in further response the court said: "If evidence is introduced in a trial of this kind, that is, physical evidence such as the evidence of Dr. Gray, which indicates that there has been an act of sexual intercourse

or a number of acts of sexual intercourse, the defendant on trial has a right under the law to ask the girl on cross-examination whether she has had sex relations with any other person, either naming them or making it general. * * * We haven't anything to go by. You have to be very careful not to allow anything that is not proven to influence you in arriving at a verdict. In other words, you must not speculate as to what might or might not have been." Appellant contends that this statement of the court—referring to the right of defendant to cross-examine the prosecutrix—was prejudicial because Dr. Gray testified after the prosecutrix had testified. The contention is without merit. The court's statement of the law was correct. The defendant had the right during the trial to recall the prosecutrix for further cross-examination, and, having neglected to do so, cannot now be heard to complain.

[2] With respect to the alleged misconduct of the district attorney, it is conceded by the Attorney General that the remarks made by the former during the course of his argument to the jury, upon which the charge of misconduct is based, were improper, but it is pointed out that defendant made no request of the court to admonish the jury with respect thereto at the time such alleged misconduct occurred. The record reveals that defendant's counsel merely assigned the remarks as "prejudicial error." It is well settled that where, as in the case at bar, the alleged prejudicial remarks are of such a nature that their effect, if any, on the jury could be cured by proper instruction of the court, it is the defendant's duty to request such an instruction. Defendant having failed to make such a request of the trial court, a reversal of the judgment based on such an alleged error, under the authorities, would be unwarranted.

In the case of People v. Chilcott (Cal. App.) 64 P.(2d) 450, 453, the following appears: "As was correctly stated in People v. Podwys, 6 Cal.App(2d) 71, 74, 44 P.(2d) 377, 378: 'There can be no excuse for such comment.' To the same effect is the text of the decision in People v. Edgar, 34 Cal.App. 459, 469, 167 P. 891. However, with respect to these statements, it must be observed that counsel for appellant did not request the trial court to admonish the jury to disregard them but as to each one rested content with an assignment of misconduct and the reservation of an exception thereto. It was the duty of counsel to have requested an admonition to the jury, and we may not assume that the trial court would have refused a request to advise the jury that such remarks had no proper place in the prosecutor's argument and should be entirely disregarded." In a well-considered case on the subject the Supreme Court has declared: "However, it appears from the record in the case that the defendant made no objection to this comment of the district attorney nor did he ask for any instruction from the court regarding the comment or requesting that the jury should be directed to disregard it. The law applicable to this subject was by a recent decision of this court declared as follows: 'Where the error is such that its effect would be obviated by an instruction to the jury to disregard it, and no such aid is invoked, the error cannot be complained of on appeal. People v. Shears, 133 Cal. 154, 65 P. 295; People v. Babcock, 160 Cal. 537, 117 P. 549; People v. Wong Hing, 176 Cal. 699, 169 P. 357; People v. Warr, 22 Cal.App. 663, 136 P. 304; People v. Vaughn, 25 Cal.App. 736, 147 P. 116, 117. Inasmuch as the court was not once, during the course of the argument to the jury, requested to instruct the jury to disregard the improper statements of the district attorney, and such an admonition would, doubtless, have been sufficient to cure any effect the remarks might have produced, the claimed misconduct in argument cannot be considered on appeal.' People v. Nakis, 184 Cal. 105, 116, 193 P. 92, 96. There is an exception to this well-recognized rule in cases where the comment is of such a character that the error could not be cured and the harmful result would not be obviated by a timely admonition or instruction to the jury. This exception applies only in extreme cases." People v. West, 215 Cal. 87, 95, 8 P.(2d) 463, 466.

[3] Appellant's argument with regard to all of the alleged prejudicial errors is largely speculative, and, considered in the light of the record of the trial, does not warrant the conclusion that such alleged errors affected the verdict. Especially is this true with respect to the claim that the alleged errors were magnified by the improbability of the testimony of the prosecutrix. Such testimony may and probably does, in most cases give rise to a difference of opinion, but, by reason of that difference of opinion, it does not follow that the tes-

timony is highly improbable. The jury saw the witness and heard her testify. Evidently she was given full credit as a witness and her testimony was believed, and the record presents no reason for disturbing the jury's implied conclusion in this respect or for disturbing the verdict.

The motion for a new trial, which was based upon alleged newly discovered evidence as well as upon the alleged errors hereinbefore referred to, was properly denied.

The judgment and the order appealed from are affirmed.

I concur: YORK, Acting P. J.

---

22 Cal.App.2d 652

CHAVOYA v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10536.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1937.

1. Workmen's compensation 🔑385

A volunteer fireman who was injured while operating floodlight truck at public celebration under fire chief's direction was injured as a volunteer fireman and entitled to benefits as such under Compensation Act, notwithstanding fireman was employed part time as maintenance man of fire alarm system, where duties as maintenance man required no regular hours, and part of his assignment as volunteer fireman was to operate floodlight truck whenever necessary (St.1933, p. 2613, § 8(g).

2. Evidence 🔑23(1)

It is common knowledge that firemen as such are often called upon to render public service where life or property is being jeopardized or endangered by causes other than fire or where safety of individuals, singly or collectively, requires protection of fire-fighting equipment.

3. Workmen's compensation 🔑626

As respects volunteer fireman's rights under Compensation Act for injuries sustained in course of his duties, fireman did not lose his status as a volunteer fireman because he was not actually engaged in fighting a fire when injured, where fireman was operating fire-fighting equipment under fire chief's direction in interests of safety of persons attending a public celebration (St. 1933, p. 2613, § 8(g).

◆

Proceedings under the Workmen's Compensation Act by Ray Chavoya, employee, opposed by the State Compensation Insurance Fund, insurance carrier. To review and annul an award of the Industrial Accident Commission, employee brings certiorari.

Award annulled, and case remanded for further proceedings.

Silas W. Mack and John Milton Thompson, both of Monterey, for petitioner.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondents.

KNIGHT, Justice.

This proceeding in certiorari was instituted for the purpose of having reviewed and annulled an award of the Industrial Accident Commission.

There is no dispute as to the facts. It appears therefrom that petitioner was injured on the night of June 29, 1935, while operating a portable electric motor mounted on an old fire truck belonging to the city of Monterey, and used by the city as part of its fire department equipment to generate electric energy for floodlights. At the time of the accident petitioner was, and for nearly twenty-five years prior thereto he had been, a member of the Monterey volunteer fire department; and since 1930 he had been employed part time by the city as electrician, at a salary of $100 a month, to keep the city's fire alarm system in working order. In support of his claim for compensation he contended that when injured he was serving the city as a volunteer fireman, and that therefore he was entitled to the amount of compensation fixed by section 8 (g) of the Workmen's Compensation Act (St.1917, p. 831, as amended by St.1933, p. 2613). That section provides that "Each male member registered as an active fire fighting member of any regularly organized volunteer fire department, having official recognition, and full or partial support of the government of the city, town, or district in which such volunteer fire department is located, shall be held and deemed to be an employee of such city, city and county, town or district for the purposes of this act, and shall be entitled to receive compensation from such city, town or district in accordance with the provisions thereof." It then goes on to declare that, irrespective of the amount of remuneration received by the volunteer fireman as such, and from other sources of employment, his compensation for injuries shall be computed on the basis of weekly wages of $38.46. The referee before whom the hearing was held found as claimed by petitioner that his case fell within the scope of said section, and fixed his compensation accordingly, at $25 a week. The commission adopted the referee's decision and entered an award in conformity therewith. Thereupon the insurance carrier, State Compensation Insurance Fund, petitioned for a rehearing, and the merits of its petition were assigned for consideration and recommendation to another referee. He held in effect, contrary to the decision of the first referee and from the same evidence, that the provisions of the volunteer fireman section of the Workmen's Compensation Act were not available to petitioner, and thus his compensation should be fixed on the basis of the monthly wage of $100 petitioner was receiving as maintenance man of the fire alarm system. Said referee recommended, therefore, that a rehearing be granted and that the award be reduced to the lesser sum of $14.25 a week. Adopting the recommendation of the referee, the commission granted a rehearing, and, without taking any additional evidence, ordered the case resubmitted, reversed its previous award, and entered a new one in conformity with the recommendations of the second referee. Petitioner then applied for a rehearing, and upon the denial thereof instituted this proceeding in certiorari to annul the second award.

[1] We are of the opinion that under the admitted facts no legal ground appears upon which petitioner may be denied the benefits afforded by the provisions of said section 8 (g) of said act. As stated, the accident occurred on June 29, 1935. At that time the fire department consisted of a fire chief, two truck drivers, and a volunteer department having thirty-two members, one of whom was petitioner. The fire chief and the truck drivers were paid regular monthly salaries, and the volunteer firemen received a dollar an hour for services actually rendered. Petitioner had been a member of the volunteer department since 1911, and his employment part time by the city as maintenance man of the fire alarm system began in 1930. His duties as such maintenance man required no regular hours, and he devoted his spare time to private enterprises, among them being radio repair work and playing in a local orchestra. His appointment as maintenance man of the fire alarm system, however, did not in any manner affect his status as an active member in good standing of the volunteer fire department, and he continued thereafter, as before, to perform all of the duties thereof. Part of his assignment as such volunteer fireman had been and thereafter was to take charge of and operate the floodlight truck whenever its use was necessary. If, however, his services as a volunteer fireman were not available at the time, the truck was driven and operated by some other volunteer fireman. Furthermore, having had much past experience as an electric lineman, he was called upon at times, when serving as a volunteer fireman at a fire, to cut or otherwise take care of live wires. For approximately two years following his appointment as maintenance man of the fire alarm system, he continued to receive in addition to his monthly salary of $100 the same remuneration paid to other volunteer firemen; but it is conceded that the discontinuance of such remuneration at the end of that time in no way altered his standing as an active volunteer fireman. In fact, the second referee in his report to the commission expressly states: "Applicant was in truth a 'volunteer fireman', though the emoluments attached to the 'employment' were revoked in 1932." On the night of the accident there was to be a public celebration on the beach, and petitioner as such volunteer fireman was directed by the fire chief to drive the floodlight truck to the scene of the celebration, and to operate the same for the purpose of illuminating the beach, the light generated thereby being sufficient, according to the testimony, to "light up a whole city block." In order to keep the crowd at a safe distance from the lighting apparatus, a rope was stretched around the truck; and while petitioner was operating the lights he tripped over a rope. In falling his right hand and wrist came in contact with the revolving cool-

ing fan of the lighting apparatus, and were mangled and fractured so that thereafter he was permanently deprived of part of the usefulness of his right hand.

In view of the foregoing undisputed facts, we are unable to sustain the conclusion reached by the second referee that the beneficial provisions of said section 8 (g) are not available to petitioner. His conclusion is based mainly on certain testimony given to the effect that the maintenance man of the fire alarm system was deemed to be a member of the paid fire department. Respondents contend, therefore, that, such being the case, petitioner's case was removed from the operation of said section 8 (g) of the Workmen's Compensation Act. The evidence establishes without conflict, however, that petitioner's duties as maintenance man of the fire alarm system were entirely separate and distinct from those he was called upon to perform as a volunteer fireman; therefore, since the undisputed facts show that he was injured while performing a duty imposed on him as a volunteer fireman, he is doubtless entitled to be compensated for his injuries accordingly.

[2, 3] Nor does the fact that petitioner when injured was not actually engaged in fighting a fire deprive him as a volunteer fireman of the benefits of said section 8 (g) of said act. In this regard it will suffice to say that it is a matter of common knowledge that firemen as such are often called upon to render public service where life or property is being jeopardized or endangered by causes other than fire; or where the safety of individuals, singly or collectively, require the protection of fire fighting equipment; and manifestly while thus engaged, under the direction of a superior officer, a fireman does not lose status as such. Here, as shown, petitioner as a volunteer fireman was injured while operating fire fighting equipment under the direction of the fire chief, in the interests of safety of those attending a public celebration. He is entitled, therefore, to the benefits extended to volunteer firemen by the provisions of said section 8 (g) of the Workmen's Compensation Act.

The award is annulled and the case remanded for further proceedings not inconsistent herewith.

We concur: TYLER, P. J.; CASHIN, J.

---

23 Cal.App.2d 153

ROCHA v. SUPERIOR WHEELER CAKE CORPORATION et al.

Civ. 11554.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1937.

Automobiles ⚷244(43)

In action for damages sustained in intersectional collision between meeting motor vehicles, evidence that defendant was driving on right-hand side of street and that plaintiff was driving down middle of street and did not give signal of intention to make left turn sustained finding of contributory negligence on part of plaintiff.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Pablo Rocha against the Superior Wheeler Cake Corporation and others. From a judgment for defendant and from an order denying a new trial, plaintiff appeals.

Appeal from order dismissed, judgment affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff commenced this action to recover a judgment for damages suffered when he was injured in an accident in which the automobile he was driving collided with a truck driven by the defendant Logan and owned by the defendant corporation. The action was tried before the court without a jury and the court found that plaintiff and defendant Logan were driving, in a careless and negligent manner and that the combined negligence of both drivers proximately caused the accident. In this appeal from the judgment in defendants' favor, plaintiff contends that the evidence is insufficient to sustain the trial court's finding of contributory negligence on the part of plaintiff.

The accident occurred on South San Pedro street in Los Angeles near the intersection of Thirty-ninth street. San Pedro street angles off toward the east at Thirty-ninth street and then continues straight south, but the street divides at the intersection and a portion of San Pedro street continues straight across Thirty-ninth street and becomes known as San Pedro place. Defendant Logan was driving north on San Pedro place and intending to continue straight along what becomes San Pedro street north of Thirty-ninth street. Plaintiff was driving south on San Pedro street and intended to execute a partial left-hand turn to continue south on San Pedro street to the south of Thirty-ninth street. Plaintiff's car and defendant's truck collided as plaintiff was about to execute the turn. The evidence is conflicting as regards the circumstances of the accident and particularly as to the point at which the collision occurred. Defendant testified that he was driving at all times on the right-hand side of the street. Plaintiff testified that he was driving down the middle of the street. There was also evidence that plaintiff did not give any signal of his intention to make the turn. The record contains ample evidence to sustain the court's finding of contributory negligence.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

23 Cal.App.2d 87

ROGERS et al. v. FOPPIANO et al.

Civ. 5743.

District Court of Appeal, Third District, California.

Oct. 6, 1937.

1. Automobiles 🔑245(38, 40)

Where automobile, traveling 35 or 40 miles per hour over wet pavement in broad daylight, followed diagonal course across and beyond edge of highway and struck pedestrian walking on pathway, whether motorist, who had pulled automobile back of automobile which he had started to pass when he observed automobile approaching from opposite direction, was negligent and whether brakes locked *held* for jury.

2. Damages 🔑132(6)

$12,529 to dramatic student whose legs were permanently injured was not excessive where there was evidence that student would be unable to follow his chosen profession, that he would be able to walk and stand with difficulty, and that an operation costing $529 would be necessary to attempt to restore reasonably normal use of legs.

3. Statutes 🔑225

Statute imposing liability on automobile owners where relationship of principal and agent or master and servant does not exist between them and operator, and statute imposing liability on owners signing a minor operator's application for driver's license, should be construed together (St.1935, pp. 145, 153, §§ 352, 402).

4. Statutes 🔑181(1)

In construing statutes, courts must ascertain Legislature's intention in enacting them, if possible.

5. Automobiles 🔑184

There is no common-law liability against automobile owner or signer of operator's license not personally negligent, in absence of relationship of principal and agent or master and servant between owner or signer and negligent operator, but liability for such imputed negligence exists solely by virtue of statute (St.1935, pp. 145, 153).

6. Automobiles 🔑249

A judgment of $10,000 rendered under statutes on theory of imputed negligence against automobile owners who had also signed minor operator's driver's license was excessive by $5,000, since it must be assumed that Legislature intended to fix limited liability of $5,000 for imputed negligence against owner and signer or either of them and not to double liability where one person owns automobile and also signs license (St.1935, pp. 145, 153, §§ 352, 402).

7. Appeal and error 🔑1152

A judgment rendered on theory of imputed negligence against automobile owners who had also signed minor operator's driver's license was not void because it was in excess of statutory liability, but judgment could be reduced to conform to law (St.1935, pp. 145, 153, §§ 352, 402).

8. Appeal and error 🔑1060(1)

In automobile accident case, statements made by plaintiffs' counsel allegedly inferring that defendants suppressed a medical report and other evidence which might have been favorable to defendants did not constitute prejudicial misconduct.

9. Appeal and error 🔑1060(1)

In automobile accident case, it was not prejudicial misconduct for plaintiffs' counsel to incidentally refer to asserted defense of a latent defect of automobile brakes as the "so-called defense," since statement amounted to a mere expression of opinion that evidence would show there was no such latent defect.

10. Appeal and error 🔑930(2)

Where jury in automobile accident case was instructed that it had sole province of determining from evidence merits of charges of negligence and defenses thereto, appellate court could not presume that jury disregarded instructions and rendered a verdict based on mere insinuation of plaintiffs' counsel that defense of a latent defect in brakes was not valid or true.

11. Appeal and error 🔑1060(1)

In automobile accident case, it was not prejudicial error for plaintiffs' attorney to demand copy of purported medical report assumed to be in possession of defendants' counsel where rendering of report was not denied, and attorney's statement that he would like to see a copy of report did not charge defendants with suppressing it but could be assumed to mean that he would like to see report, regardless of who had possession of it.

12. Trial 🔑106

Considerable latitude is accorded to attorneys in presenting their arguments to juries.

13. Trial 🔑121(2)

An attorney in presenting his argument to jury may fairly reason from evidence adduced that a witness has misstated facts or sworn falsely, and he may also express his opinion based upon fair deductions and reasonable inferences from evidence.

14. Appeal and error 🔑207

Defendants waived objections to prejudicial nature of challenged statements of plaintiff's counsel by failing, at time statements were made, to assign them as prejudicial and by neglecting to ask court to instruct jury to disregard them.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Harold L. Rogers, by and through Harold C. Rogers, his guardian ad litem, and another against Floyd Foppiano and others. From a judgment for plaintiffs, defendants appeal.

Judgment modified and, as modified, affirmed.

Nutter & Rutherford, D. R. Jacobs, and Philip Cavalero, all of Stockton, for appellants.

Gumpert & Mazzera, of Stockton, for respondents.

Mr. Justice Thompson delivered the opinion of the court.

The defendants have appealed from a joint and several judgment of $10,000 which was rendered against them in a suit for damages for injuries sustained as a result of negligent operation of an automobile causing it to strike and seriously injure a pedestrian. A separate judgment was rendered against Floyd Foppiano, the driver of the machine, for the total sum of $12,529.

The appellants contend that the judgment of $10,000 which was rendered against Eugene and Anna Foppiano, husband and wife, as owners of the automobile, and as parents of their minor son, Floyd, whose application for a motor vehicle license they signed, creates a liability against them of a sum not to exceed $5,000, as provided by sections 352 and 402 of the Vehicle Code of California (St.1935, pp. 145, 153). The theory upon which the verdict was returned and the judgment rendered against these defendants was that these sections impose a separate and cumulative liability of $5,000 against the owners of the machine, and a similar maximum liability as signers of the application of their son for a motor vehicle license. It is also asserted the court erred in giving to the jury an erroneous instruction upon the same subject; that the plaintiffs' attorneys were guilty of prejudicial misconduct during the course of the trial; and that the amount of damages awarded is speculative and excessive.

At 8 o'clock on the morning of January 15, 1936, the plaintiff Harold L. Rogers, a student, was walking northerly along a pedestrian's pathway which parallels Pacific avenue north of Stockton, at a distance of about 7 feet westerly from the highway. He was on his way to attend sessions of morning classes at the College of the Pacific. He observed two automobiles approaching from the north along the westerly side of the highway. The pavement was wet as a result of rain which occurred during the previous night. The machine nearest to Rogers at that time was a Ford automobile which was about half a block distant. It was traveling at the rate of 20 miles an hour. The defendants' Dodge pickup, driven by Floyd Foppiano, the minor son of the other defendants, followed at a short distance in the rear of the Ford machine. It was traveling at the rate of 35 or 40 miles an hour. Just before the Ford machine reached a point opposite the plaintiff the Dodge car turned to its left across the center line of the highway to pass the Ford machine. Observing the proximity of another automobile which was approaching from the south on the easterly side of the highway, the driver of the Dodge car suddenly pulled his machine back behind the Ford car and applied his brakes to avoid colliding with it. The Ford automobile passed on its way, but the Foppiano machine, without warning, followed a diagonal course across and beyond the westerly edge of the highway and struck and seriously injured the plaintiff. A disinterested witness, who was also approaching the plaintiff on that pathway, corroborates these facts.

The defendants contend that their machine skidded on the wet pavement, causing the driver to lose control of his vehicle and that the accident was therefore unavoidable. They also assert that the brakes of their car suddenly locked, pulling the machine from its course and causing the accident through no fault on their part. They testified that the brakes had never before locked in that fashion and that they had no previous knowledge of that defect. The evidence is conflicting with respect to these defenses.

It appears that the Dodge automobile was jointly owned by Eugene and Anna Foppiano, husband and wife, who purchased it with their community funds. It was registered in the name of Eugene Foppiano. Both the father and mother of the minor child signed and verified his application for a driver's license.

[1] Although there is a conflict of testimony regarding the cause of the accident, there is substantial evidence to support the implied finding of the jury that it occurred as a result of the negligence of Floyd Foppiano in his operation of the Dodge machine. He was traveling 35 or 40 miles an hour over a wet pavement; it was broad daylight and he should have been able to see the proximity of the approaching automobile from the south before he attempted to pass the Ford machine. The jury was warranted in assuming that he failed to exercise reasonable care in attempting to pass the Ford machine without first looking for approaching machines, and that the rapid speed of his car and the sudden change of its course caused him to lose control of the vehicle. There is a decided conflict of evidence as to whether his brakes locked when he suddenly applied them. There is evidence that they never locked before or after that occasion. Upon examination of the brakes immediately after the accident occurred, the mechanic merely found fine dust upon the brakes. There is no evidence there was anything mechanically wrong with the brakes. It was solely the province of the jury to determine from the evidence whether the conduct of Floyd Foppiano amounted to negligence. With that province, under the circumstances of this case, we may not interfere.

[2] A judgment of $12,529 was rendered against Floyd Foppiano, the driver of the Dodge automobile. We are of the opinion that amount of damages against Floyd Foppiano was neither speculative nor excessive. The plaintiff Harold L. Rogers was studying dramatics with the object of becoming an actor. There is evidence to the effect that his legs are permanently injured, so that he will be unable to follow his chosen profession, and that he will be able to walk and stand with difficulty. It also appears that an operation will be necessary to attempt to restore a reasonably normal use of his limbs, which will cost the sum of $529. Those facts were testified to by competent medical authorities. The judgment against Floyd Foppiano is not excessive or speculative.

[3-6] We are of the opinion the judgment of $10,000 which was rendered against Eugene and Anna Foppiano, on the theory that they were guilty of imputed negligence for the reason that they are the owners of the automobile involved in this action, and because they signed the application of their son, Floyd, for a driver's license, is in contravention of the limitation of liability for imputed negligence which is fixed by the provisions of sections 352 and 402 of the Vehicle Code of

California, and that the judgment against them should therefore be reduced to the sum of $5,000.

It is insisted the maximum liability of the owners of an automobile, when the relationship of principal and agent or master and servant does not exist between them and the operator of the machine, is $5,000 under the provisions of section 402 of the Vehicle Code, and that an additional or cumulative liability for a similar sum exists under the provisions of section 352 of that Code by reason of the fact that the owners of the car also signed the application of the minor operator of the machine for his driver's license. We think not. These sections of the Vehicle Code should be construed together. Reference to these sections discloses the fact that both of them relate to imputed negligence. It is a cardinal principle in construing statutes to ascertain, if possible, the intention of the Legislature in enacting them. It seems quite evident that, in adopting sections 352 and 402 of the Vehicle Code, the Legislature intended to create a limited liability for imputed negligence against both the owner of an automobile and the signer of a driver's license. There is no common-law liability against either the owner of a machine or the signer of an operator's license not personally guilty of negligence, in the absence of a relationship of principal and agent or master and servant between themselves and the driver of a machine who alone is guilty of the negligence charged. That liability is solely the creature of the statute. Liability for such imputed negligence does not exist in California except by virtue of the provisions of the statute. The statute provides that, if one is the owner of an automobile involved in an accident which is driven by another person who is not in the relationship of an agent or servant, he may still be held liable for damages resulting therefrom to the limited extent of $5,000. The statute also provides that under similar circumstances he may be held liable to the limited extent of $5,000 as the signer of a driver's license held by the guilty party. The statute does not state that he may be held for damages for $10,000 if he happens to be both the owner of the machine and the signer of the license. If the Legislature had intended to double the limited liability under such circumstances, it would have been very easy to have so expressed it in the statute. We must assume the Legislature intended to fix a limited liability of $5,000 for imputed negligence against the owner of an automobile and the signer of a driver's license or either of them, and that it did not intend to double that limited liability when the same individual was both the owner of the machine and the signer of the license. We are therefore of the opinion the court was not authorized to render judgment against Eugene and Anna Foppiano for more than the limited statutory amount of $5,000.

[7] The judgment of $10,000 which was rendered against Eugene and Anna Foppiano is not void because it is in excess of the limited liability against them as provided by sections 352 and 402 of the Vehicle Code, but may be reduced to conform to the law. Milburn v. Foster, 8 Cal.App.(2d) 478, 47 P.(2d) 1106; Harveld v. Milani, 1 Cal.App.(2d) 157, 36 P.(2d) 393; Webster v. Harris, 119 Cal. App. 46, 6 P.(2d) 88; 2 Cal.Jur. 987, § 584.

[8-10] Several assignments of alleged prejudicial misconduct on the part of counsel for the plaintiffs are urged. They relate to statements made during the course of the trial which, it is asserted, infer that the defendants suppressed a medical report and other evidence which might have been favorable to them. These assignments also refer to certain unfavorable statements made by counsel for the plaintiffs in their argument to the jury. We have examined these assignments and are of the opinion they do not constitute prejudicial misconduct. It was not prejudicial misconduct for counsel to incidentally refer to the asserted defense of a latent defect of the automobile brakes as the "so-called defense." That amounted to a mere expression of opinion that the evidence would show there was no such latent defect. The weight of the evidence does show no such defect existed. The jury was fully instructed that it had the sole province of determining from the evidence the merits of the charges of negligence and the defenses thereto. We may not presume the jury disregarded the instructions and rendered a verdict based on a mere insinuation that the defense of a latent defect in the brakes was not valid or true. The expression was harmless.

[11-13] Nor was it prejudicial error for the plaintiffs' attorney to demand a copy of a purported medical report, which he assumed was in the possession of de-

fendants' counsel. Upon the first demand in open court for the procuring of the document the attorney for the defendants said, "I will do it during the noon recess." Upon a subsequent demand for the same document which was made after the recess the attorney said, "As far as I know, there has been no written report to me." Plaintiffs' attorney then replied, "I would like to have a copy of it. * * * I want to see a copy of the report." Since the rendering of the report is not denied, the inference may reasonably be drawn that such a report actually did exist, although it was not given to the attorney for the defendants. The reply of plaintiffs' attorney that he would like to see a copy of that report may reasonably be assumed to have meant that he would like to see the document, regardless of who had possession of it. He did not charge the defendants' attorney with suppressing it. That statement was also harmless. Finally, some statements of counsel made in the course of his argument to the jury are assigned as prejudicial. They apply to the credibility of witnesses and to the weight of evidence. These challenged statements appear to have been within legitimate bounds of argument. While they are in the form of affirmative statements, it is apparent they are mere opinions prompted by what may be deemed to be fair inferences from the evidence according to the plaintiffs' theory of the facts. There is no fixed standard of reasoning. Considerable latitude is therefore accorded to attorneys in presenting their arguments to juries. An attorney has a right to fairly reason from the evidence adduced that a witness has either misstated the facts or that he has sworn falsely. He may also express his opinion based upon fair deductions from the evidence or from reasonable inferences therefrom. It is difficult to say just how illogical an attorney may be in his argument to a jury without transgressing upon the rules of conduct, provided he does not willfully misstate the evidence. We are convinced there is nothing in the present case which may be deemed to be prejudicial misconduct in that regard. 24 Cal.Jur. 743, § 26; Baker v. Market Street Railway Co., 123 Cal.App. 688, 11 P.(2d) 912.

[14] Moreover, the defendants waived their objections to the prejudicial nature of these challenged statements of counsel by failing, at the time they were made, to assign them as prejudicial and by neglecting to ask the court to instruct the jury to disregard them. Kershaw v. Tilbury, 214 Cal. 679, 690, 8 P.(2d) 109; Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393; Murphy v. Zwieg, 100 Cal.App. 266, 279 P. 1062.

The judgment is modified by reducing the amount of damages which was awarded against Eugene and Anna Foppiano to the sum of $5,000. The trial court is directed to amend the judgment accordingly. As so modified, the judgment is affirmed, respondents to recover costs on appeal.

We concur: PULLEN, P. J; PLUMMER, J.

---

23 Cal.App.2d 19

PEOPLE v. KRETCHMAR.

Cr. 1575.

District Court of Appeal, Third District, California.

Oct. 1, 1937.

1. Criminal law 🔑1081

Where notice of appeal from order denying defendant's application to be transferred from state prison to enable him to appear as witness at hearing on petition for writ of coram nobis was not given in open court at time order was rendered, purported notice of appeal given a week later was ineffectual (Penal Code, § 1239, as amended by St.1935, p. 1868; and § 1567, as amended by St.1933, p. 1347).

2. Criminal law 🔑1177

Denial of defendant's application to be transferred from state prison to enable him to appear as witness at hearing of petition for writ of coram nobis was harmless, where defendant's affidavit presented at hearing contained complete statement of facts.

3. Criminal law 🔑997

Motions for writ of coram nobis to set aside judgment, based on ground that defendant pleaded guilty to charge of burglary in ignorance of fact that it was necessary element of burglary that building be entered with intent to commit felony, and that he entered building with owner's consent, was properly denied, where defendant knew that his associate accused defendant of planning to enter building with intent of stealing, since the alleged error was one of law and not of fact (Penal Code, § 459).

4. Criminal law ⚿997

The writ of coram nobis lies only to correct errors of fact and may not be resorted to for purpose of correcting errors of law.

5. Criminal law ⚿997

Where defendant's affidavit in support of motion for writ of coram nobis to set aside judgment showed that defendant was not misled or deceived by statement of district attorney but that defendant merely concluded that plea of guilty would place him in a more favorable light with court and that his confession of guilt might result in a shorter term of imprisonment, district attorney's statement did not constitute fraud which deprived defendant of trial and was not ground for granting motion.

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Ernest Kretchmar filed a plea of guilty to a charge of burglary, and, from an order denying his motion for a writ of coram nobis to set aside a judgment entered thereon, he appeals.

Affirmed.

Richard H. Fuidge, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from an order denying his oral motion for a writ of coram nobis to set aside a judgment sentencing him to state prison, which was rendered a year and eight months previously, following his plea of guilty to a charge of burglary. It is contended the defendant pleaded guilty to the charge in ignorance of the fact that it is a necessary element of the crime of burglary that the building be entered with the intent to commit larceny, or some other felony. On the contrary, he contends that he entered the building in question with the consent of the owner. He therefore asked that the judgment be set aside and that he be permitted to change his plea to that of not guilty and receive a trial by jury. The motion was heard on the affidavit of the defendant and upon the evidence adduced at the preliminary hearing of the case. Oral notice of appeal from the order denying his motion for a writ of coram nobis was announced in open court at the time the order was made.

[1] The defendant also attempted to appeal from an order of the same court previously made on June 24, 1937, denying his application under section 1567 of the Penal Code (as amended by St.1933, p. 1347) to be transferred from the state prison where he is serving sentence to enable him to appear as a witness and testify at the hearing of his petition for a writ of coram nobis. No notice of appeal from that order was given at the time in open court as required by section 1239 of the Penal Code (as amended by St. 1935, p. 1868). The purported notice of appeal which was given a week later is ineffectual. People v. Lanham (Cal.App.) 69 P.(2d) 426; People v. Moore (Cal. App.) 63 P.(2d) 835. The Code prescribes the only method of perfecting an appeal from an order which is made in a criminal case after judgment is pronounced. The Code says in that regard: "An appeal * * * may be taken by the defendant * * * from any order made after judgment by announcing in open court at the time the same is made that he appeals from the same."

The defendant failed to conform to this statutory requirement.

[2] Moreover, it does not appear that the defendant was prejudiced by the denial of his request to personally appear as a witness at the hearing. A very complete statement of the facts relied upon was included in the affidavit of the defendant which was presented at the hearing. It does not appear he could have testified to further material facts which are not included in his affidavit. The denial of the motion was therefore harmless.

The appeal from the order refusing to permit the defendant to be transferred from state prison to become a witness at the coram nobis hearing was ineffectual for lack of statutory notice, and it is therefore dismissed.

[3, 4] Assuming, without so deciding, that an oral motion for a writ of coram nobis may be lawfully presented without filing a petition therefor, we are of the opinion the writ was properly denied, for

the reason that the error of which the defendant complains is really one of law and not merely a mistake of fact. The proceedings indicate that the defendant pleaded guilty to the charge of burglary because he did not realize the law requires, as a necessary element of that offense, that the accused person shall enter the building "with intent to commit grand or petit larceny or any felony." Section 459, Pen.Code. He now contends that he entered the building in company with another person with the consent of the owner to procure his own belongings, and that, while they were in the building, his associate, Edgar Andrews, without his knowledge or consent, stole two revolvers belonging to the owner of the building. He said he was led to believe that under such circumstances he would be guilty of burglary even though he entered the building for a lawful purpose and without knowledge of his associate's intent to commit larceny, or that he had stolen property while they were in the building. This merely means that he was mistaken as to what the law requires with respect to the necessary elements of the crime of burglary. That amounts to a mistake of law and not one of fact. The writ of coram nobis lies only to correct errors of fact. It may not be resorted to for the purpose of correcting errors of law. 2 R.C.L. 307, § 262; 15 R.C.L. 714, § 166; 3 Am.Jur. 766, § 1276; 26 Standard Encyc. of Proc., 601, II, 3; People v. Moore, 9 Cal.App. (2d) 251, 49 P.(2d) 615; People v. Lumbley (Cal.Sup.) 68 P.(2d) 354, 358. In 2 Ruling Case Law p. 306, § 261, it is said that the writ of coram nobis "is not allowed as of course, but only on its being made to appear with reasonable certainty that there has been some error of fact."

The court was warranted in concluding that the defendant was not misled regarding the pretended facts of the case. The defendant knew that he was charged with inducing his associate, Andrews, to go with him to the cabin of a miner by the name of Massa, near Camptonville, to steal his revolvers, and that they did enter the cabin together for that purpose at about 8 o'clock p. m. on August 28, 1936, at which time the defendant took the revolvers and subsequently gave one of them to Andrews in payment of a debt which he owed to him. At the preliminary examination of the defendant and Andrews on the charge of robbery, the transcript of which was received in evidence without objection on this coram nobis proceeding, C. C. McCoy, the sheriff of Yuba county, testified in that regard:

"I investigated * * * at Mariposa and found that he (Kretchmar) had sold a gun down there for $15.00. * * * Andrews was picked up over in Downieville. * * * When the sheriff arrested him he found Massa's [other] gun. * * * He told me he had met Kretchmar at Grass Valley and on the day of this burglary Kretchmar had talked the matter over with him in regard to Massa's guns and that he could get them without any trouble. * * * So they went over there that night to Massa's residence, Kretchmar reached under the steps and got the key and they went into the house and they carried out some foodstuffs and these guns were taken out. * * * Kretchmar said that he owed him (Andrews) some money and he gave him a gun for this debt."

Mr. McCoy further testified that he later talked to Kretchmar about the burglary, and he said "he didn't remember it, but if Andrews said it was so, it must be so." The sheriff further testified that "Kretchmar admitted that after they left Massa's place they went over to Jake's place and while there they did considerable drinking and that the long gun was at the head of Jake's bed and they picked the gun up and took it with them." This colloquy then occurred in the presence of Kretchmar during the preliminary hearing:

"By defendant Andrews: It wasn't admitted that I helped take the gun.

"By Mr. McCoy: No, you at no time admitted that you carried the guns out of the house, but you told me * * * the matter was talked over between you two about coming over here to get these guns. Is that correct?

"By defendant Andrews: Yes, but there is a little more to it, Sheriff. I tried to persuade him not to go.

"Mr. McCoy: Yes, that's right."

At the conclusion of the evidence adduced at the preliminary hearing, the defendant, Kretchmar, was instructed by the magistrate of his rights and was then asked if he wished to make any statement or ask questions of the witness. He replied, "No, I think not."

From the preceding evidence it appears clear that Kretchmar knew his associate, Andrews, deliberately accused him of planning to enter the Massa cabin with the purpose and intent of stealing the revolvers. He did not contradict the statements made by Andrews or McCoy at the preliminary hearing. No suggestion was then made that he enered the cabin with the consent of its owner to get his own property. Evidently that was an afterthought. It comes too late to assert with probity. The court was justified in denying the writ.

It is true that at a separate trial of Andrews which occurred before the same trial judge, a jury acquitted him of the charge of burglary. It is suggested that verdict is inconsistent with Kretchmar's plea of guilty. The verdict acquitting Andrews furnishes no light regarding the guilt of this defendant. In truth it is in accordance with the statement of Andrews made to Sheriff McCoy and again confirmed at the preliminary hearing, to the effect that Kretchmar planned the burglary and entered the cabin with the intention of stealing the revolvers, to which he protested. We must assume the jury believed Andrews did not enter the building with the intent to commit larceny.

[5] It is further suggested in support of the motion for a writ of error coram nobis that, prior to the time when this defendant entered his plea of guilty, the district attorney, W. C. Rucker, who subsequently died, said to this defendant: "If you use your head and do not create a disturbance, or put the county to the expense of a jury trial, possibly the court may go lighter on you and you may get only a jail sentence or perhaps probation. You cannot expect to get in the clear absolutely on this matter, because you took Andrews out there and if you had not taken him the guns would not have been gone; you are really as much to blame as he is because you are an accomplice."

Regarding this statement of the district attorney, the affidavit in support of the motion for a writ of coram nobis concedes that affiant was not deceived thereby. It reads: "Affiant states the fact to be that the district attorney never at any time, or in any way, actually or in terms or by implication promised or indicated to affiant that this would be the result of his pleading guilty, or that he would be in any position to, or would attempt to influence the court in its proceeding but affiant gathered the impression that if he followed the suggestion of the district attorney, he would appear in a much more favorable light in the eyes of the court and that it would be but a matter of a short while before he would be freed."

It is apparent from the preceding statement of the affiant that he was not misled or deceived by the statement of the district attorney. He merely concluded that a plea of guilty would place him in a more favorable light with the court, and that his confession of guilt might result in a shorter term of imprisonment. In other words, he speculated on the result of pleading guilty. That statement of the district attorney did not constitute fraud which deprived the defendant of a trial. In the case of People v. Forbes, 219 Cal. 363, 26 P.(2d) 466, it was held that an application for a writ of coram nobis was properly refused where the petitioner failed to show that he was induced to plead guilty to a charge of murder by fraud or improper influence. In the case of People v. Lumbley, supra, in holding that the application for a writ of coram nobis was properly refused, the court quoted with approval from the case of People v. Moore, supra, as follows: "We fail to see how the position of defendant in this proceeding is any different from that of a person who pleads guilty to a crime believing in fact that he was guilty of the same at the time of his plea, when, as a matter of law, the facts could not establish his guilt. In the latter situation a defendant would have the undoubted right to make a motion to change his plea."

The preceding language is peculiarly applicable to the situation in the present proceeding.

We are of the opinion the court properly denied the motion for a writ of coram nobis.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

23 Cal.App.2d 148

MARSDEN v. COLLINS et al.

Civ. 11537.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1937.

Hearing Denied by Supreme Court Dec. 9, 1937.

1. Judgment 🔑17(2)

The superior court had jurisdiction to enter default on cross-complaint, served by mailing of copy by defendants' attorneys to plaintiff's attorney having office in same city at place where there was mail delivery service (Code Civ.Proc. § 1012, as amended by St.1931, p. 1534).

2. Courts 🔑92

A Court of Appeal's decision that affidavit as to service of cross-complaint was insufficient for failure to show that person making service and person served resided in different counties in case wherein statutory amendment authorizing service by mail on person residing or having office at place where there is mail delivery service was not considered or involved constituted mere dictum on question of superior court's jurisdiction to enter default on cross-complaint served by mailing of copy by defendants' attorneys to plaintiff's attorney having office in same city at such place (Code Civ.Proc. § 1012, as amended by St.1931, p. 1534).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Arthur Marsden, Jr., a minor, by his guardian ad litem, Arthur Marsden, against George Robb Collins and another, in which defendants filed a cross-complaint. From an order denying plaintiff's motion to set aside an order entering a default for failure to answer the cross-complaint, plaintiff appeals.

Affirmed.

H. S. Shapiro, of Los Angeles, for appellant.

Fogel, Beman & Jones, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal by the plaintiff from an order of the superior court denying his motion to set aside an order entering default on a cross-complaint. The plaintiff commenced an action against the defendants to recover damages for personal injuries arising out of an automobile accident. The defendants filed an answer and a cross-complaint. The offices of the attorneys both for the plaintiff and defendant were located in Los Angeles, at a place where there is a delivery service by mail. And the affidavit of service by mail so stated after the service of the cross-complaint was made for the plaintiff by sending a copy thereof through the mail. In due time a default for failure to answer the cross-complaint was entered. One year later, lacking two days, notice of motion to set aside default was filed. This motion was denied, and the plaintiff appeals from this order.

[1] It is the plaintiff's contention that the court had no jurisdiction to enter the default, and he relies upon the case of Carlon v. Gray, 10 Cal.App.(2d) 658, 663, 52 P.(2d) 966, 969, wherein it is said: "In making service by mail and presenting to the court in which the action is pending, proof of such service in order to show jurisdiction to thereafter proceed in the case, strict compliance must be had with sections 1012, 1013 and 1013a of the Code of Civil Procedure. * * * An affidavit, if it does not show the name and address of the party serving, and the name and address of the party to be served, *and the fact of residence in different counties,* is insufficient to give the court jurisdiction to enter a default judgment." (Italics ours.)

Prior to 1931 service of a cross-complaint by an attorney could not legally be made by mailing a copy of the cross-complaint to the opposing attorney where both attorneys resided or had their offices in the same city. However, on June 12, 1931, section 1012 of the Code of Civil Procedure was amended by adding the portion italicized in the following quotation from said section: "1012. Service by mail, when. Service by mail may be made *where the person on whom it is to be made resides or has his office at a place where there is a delivery service by mail, or* where the person making the service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail. (Amendment approved June 12, 1931; Stats.1931, p. 1534.)"

If the contention of the plaintiff be correct, then it must be held that the amendment is without effect. If meaning is to be attributed to the amendment, then the service of the cross-complaint as made in this case was sufficient.

[2] Turning to the Carlon Case we find that it does not furnish authority in support of the plaintiff's position because the service which was declared insufficient in that case was not made by a person having his office or residence in the same place in which the person to be served had his office or place of residence. It was the affidavit itself, because it failed to state the residence or post office address of the party served which was found insufficient. The appellate court in making its decision in that case did not have occasion to discuss the amendment which is all-important in the instant case, and since that point was not involved the language of the court in the Carlon Case constitutes dictum only on the question now before this court. There is nothing in that case to indicate that the court took into consideration the effect of the amendment, and there was no reason for the court to do so because the question was not involved. All of the other cases relied upon by the plaintiff were decided prior to the 1931 amendment and hence constitute no authority.

In our view the court had jurisdiction to enter the default.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.

---

22 Cal.App.2d 607

FLYNN et al. v. KUMAMOTO et al.

Civ. 5836.

District Court of Appeal, Third District, California.

Sept. 23, 1937.

1. Automobiles 🔑243(17)

The fact that bicycle, equipped with red reflector, visible for 200 feet, on rear, had no headlight, was immaterial on question of rider's contributory negligence in his action for injuries sustained when bicycle was struck in rear by defendants' automobile, as absence of headlight did not proximately contribute to accident (St.1935, p. 203, § 622).

2. Automobiles 🔑168(8)

The duty devolves on automobile driver, blinded by bright lights of approaching automobile, to reduce speed so that he can stop immediately, if required to protect another user of highway (St.1935, p. 176, § 510).

3. New trial 🔑76(1)

A court is not authorized to set aside jury's award of damages as excessive, unless excess appears as matter of law or recovery is so grossly disproportionate to any compensation reasonably warranted by facts as to shock sense of justice and immediately raise presumption that it resulted from passion, prejudice, or corruption.

4. Appeal and error 🔑837(2)

A reviewing court may consider fact that jury, to which cause was first presented, returned verdict awarding damages for personal injuries in same sum as that awarded by court on new trial of case without jury, in determining whether such amount is excessive on subsequent appeal.

5. Appeal and error 🔑1013

The District Court of Appeal must be influenced somewhat by fact that jury, awarding plaintiff damages for personal injuries on first trial of action therefor, and judge, awarding same amount in second trial, were in position to see nature of injuries and their effect on plaintiff's general physical well being in determining whether award is excessive.

6. Damages 🔑132(1)

An award of $5,000 damages to 14 year old boy for lacerated wounds on arm, head cut, and swelling in knee, resulting in permanent and increasing limitation of action of arm and knee and disfiguring scars, was not excessive.

◆

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Action by Reed Flynn, by his guardian ad litem, Thomas Flynn, and the latter individually, against George Kumamoto and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Gerald M. Desmond, of Sacramento, for appellants.

Ray T. Coughlin and Robert A. Zarick, both of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal arises from a judgment in favor of plaintiffs in the sum of $5,000 for personal injuries sustained by Reed Flynn, a minor.

The facts surrounding the accident, which are not disputed, show that appellant George Kumamoto was driving a sedan with the permission of the owner of the car and with the consent of his father and mother, who had, prior to the accident, signed a driver's application for George Kumamoto, a minor.

The accident occurred on the night of October 20, 1935, at about 7 o'clock in the evening. At that time, Reed Flynn, a minor aged about 14 years, was riding a blue-colored bicycle southwesterly along the Folsom road in Sacramento county. Upon that occasion he was accompanied by his brother Howard Flynn, also a minor, about 15 years of age. The boys were proceeding on their way homeward. Some time prior to the accident mechanical trouble developed in the bicycle ridden by respondent, and the two bicycles were tied together with a rope, one end attached to the seat of the bicycle ridden by Howard and the other end tied to the bicycle ridden by respondent, and were separated by a distance of approximately 5 feet. At times Howard would have to pull the bicycle of Reed and at other times Reed was able to propel it himself. Both bicycles were equipped with red reflectors, although neither had headlights.

The Folsom road where the accident occurred consisted of a concrete pavement 23 feet 3 inches in width, divided in the center by a white stripe with macadam shoulders upon each side of the concrete pavement. At the time of the accident the boys were riding their bicycles upon the macadam shoulder and on the proper side of the highway. Just prior to the accident appellant was driving a sedan in a southwesterly direction on the concrete portion of the highway behind respondent.

Just before the accident appellant observed a car with bright lights approaching at a distance of approximately 200 feet, traveling 2 or 3 feet south of the white line on the center portion of the concrete pavement. After the approaching car had passed and appellant's vision was restored to normal he observed the leading bicycle about 10 or 15 feet in front of him, and almost immediately thereafter he struck respondent, who was thrown from his bicycle to the highway. As a result of the accident respondent received certain injuries, for which he was awarded the sum of $5,000 general damages, and the further sum of $160 special damages were awarded to the father for medical care and attention.

In this appeal two points are urged for reversal. One is that respondent was guilty of contributory negligence as a matter of law in riding an unlighted bicycle upon a public highway at night, and that the award of $5,000 general damages was excessive.

[1] Section 622 of the Vehicle Code (St.1935, p. 203) provides that bicycles "shall be equipped with a lamp emitting a white light visible under normal atmospheric conditions from a distance of three hundred feet in front of such bicycle and with a red reflector on the rear so designed and located as to be visible for at least two hundred feet when directly in front of a motor vehicle displaying lawful undimmed headlights, or with a rear lamp exhibiting a red light visible from a distance of two hundred feet to the rear."

Inasmuch as the bicycles were equipped with red reflectors, which was not disputed, and were visible at a distance of 200 feet when directly in front of a motor vehicle as was established by evidence, it is immaterial in this case that such bicycles were not equipped with a headlight, as the absence of that light did not proximately contribute to the cause of the accident, the absence of such a light not in any manner contributing to the accident. Greeneich v. Knoll, 73 Cal. App. 1, 238 P. 163.

[2] The negligence on the part of defendant George Kumamoto seems to have been that, although his vision was obstructed by the light of an approaching automobile, he did nothing to protect others who might be using the highway during the time that he was blinded by the bright lights of the approaching car.

Section 510 of the Vehicle Code (St.1935, p. 176), in existence at the time of the accident, provides: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

The duty devolves upon the driver of an automobile upon such conditions to so reduce the speed of his car that he can stop immediately if called upon to do so. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 715, 41 A.L.R. 1027.

In Hatzakorzian v. Rucker-Fuller Desk Co., supra, it is said: "That it is the duty of a driver of an automobile to anticipate the presence of pedestrians upon the highway over which he is thus traveling, is settled as a part of the law of the road and is emphasized in Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A.L.R. 401, and in Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125."

In the case last above cited it is held the driver is bound to anticipate that he may meet persons at any point upon the highway, and must keep a proper lookout for them, and keep his machine under such control as will enable him to avoid a collision, and, if necessary, he must slow up and stop.

In Hatzakorzian v. Rucker-Fuller Desk Co., supra, the court quoted with approval from Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471, as follows: "It is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with pedestrians and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. Accordingly, the fact that he did not know that anyone was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway."

[3] Neither can we agree with appellant that the verdict is excessive. As expressed in 8 California Jurisprudence 834, "Courts are not authorized to set aside the award of damages made by the jury as excessive merely because the opinion of the judge is at variance with that of the jurors. It is only where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise at once a presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that the court may exercise this power."

[4] There is nothing in the record that indicates any bias or prejudice. The case now before us is the second time the matter has been considered by the trial court. The cause was first presented to a jury, who returned a verdict in the sum of $5,000, in which case, however, a new trial was granted because of an erroneous instruction. The present case was tried before the court sitting without a jury. That such a situation may properly be considered by a reviewing court is established in the case of Gackstetter v. Market Street Ry. Co., 10 Cal.App.(2d) 713, 52 P.(2d) 998, and Grant v. Los Angeles Transfer Co., 45 Cal.App. 731, 188 P. 294.

[5] We must be influenced somewhat by the fact that the jury which awarded damages to respondent for his injuries in the first trial, and the trial judge who made the same award in the second trial, were in a position in each instance to actually see the nature of the injuries sustained by respondent and their effect upon his general physical well being.

[6] Dr. Dozier, a physician of the highest standing and reputation in this community, testified that he examined Reed Flynn, the plaintiff herein, on the 7th day of November, 1935, and at that time found a lacerated wound extending from under the upper left arm down and across the arm partly to the elbow, and another wound some 7 inches long also on the upper left arm. Also a cut in the midline of the head over the occiput, some 3 inches long. In December of the same year, plaintiff again called for a physical examination, and at that time complained of pain and swelling in the right knee. On July 8, 1936, the doctor again examined plaintiff, and found that the wounds had healed and scars had formed, both upon the arm and upon the head. He found there was approximately a 10 per cent. limitation on the part of plaintiff to raise his left arm perpendicularly as compared with the right because of a tightening and drawing of the transverse scar. At that time the right knee was still slightly impaired, and the limitation in the knee and in the arm had increased somewhat over what had been found upon prior examinations.

In view of this testimony that there was some limitation of action, both in the arm and in the knee, and that such limitation was permanent, and had tended somewhat to increase, all of which will constitute an impairment for a young man in many mechanical occupations, together with the disfigurement of the scars upon his body, would justify the court in awarding the damages as found in the judgment.

The judgment must therefore be affirmed, and it is so ordered.

We concur: PLUMMER, J., THOMPSON, J.

23 Cal.App.2d 178

GEORGE HERZ & CO. v. SOLT et al.

Civ. 1653.

District Court of Appeal, Fourth District, California.

Oct. 15, 1937.

1. Subscriptions 🔑12

The respective obligations among themselves of signers of subscription lists, who severally agreed to pay respective amounts set opposite their names, were several and not joint and several.

2. Contracts 🔑155

If there is any ambiguity in contract that may reasonably bear one of two constructions, construction most favorable to parties who did not prepare contract and were not responsible for ambiguity should be adopted.

3. Appeal and error 🔑1008(3)

The initial power to construe contract is in trial judge, and, if his construction is neither arbitrary nor unreasonable but a fair interpretation, it should be accepted on appeal.

4. Contracts 🔑189

Contract for grading and oiling street, in form of letter addressed to street improvement association, for "cost plus 10% under your direction," which provided that "we will do a minimum of fifteen hundred dollars worth of work or more at your option," was construable as containing option for work in addition to that costing $1,500, which association could exercise at will.

5. Appeal and error 🔑1011(1)

Where finding by trier of facts resolves conflict in evidence in favor of defendants, reviewing court cannot disturb finding on appeal.

6. Appeal and error 🔑1012(1)

It is trial judge's province to weigh evidence and within legal limits to determine its sufficiency.

7. Contracts 🔑350(1)

In contractor's action against street improvement association for work done in excess of minimum amount contracted for, evidence that individual member of association raised additional money on his own responsibility and that contractor told members that he was obtaining money from subscriptions elsewhere *held* to authorize finding that association was not estopped from denying liability by having permitted work to continue, and additional money to be paid to contractor, in excess of minimum.

◆

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by George Herz & Co. against Frank Solt and others, individually and as members of the Fifth Street Improvement Association. From a judgment for defendants, plaintiff appeals.

Affirmed.

Guthrie & Curtis, of San Bernardino, for appellant.

Wilson & Coughlin, of San Bernardino, for respondents.

MARKS, Justice.

Plaintiff sued to recover a balance of $1,067.55 alleged to be due for grading and oiling a portion of Fifth street in the city of San Bernardino. Judgment went for defendants, and this appeal followed. In its opening brief plaintiff thus states the questions involved on this appeal:

"(a) Is there a true option contained in an agreement which provides that one party shall do a certain piece of street work under the direction of a second party, the value of the work to be of a fixed minimum, or more, at the option of the second party, the work to be paid for at cost plus ten per cent?

"(b) If such an agreement does contain an option, is such option exercised by the actual direction of the work contemplated by the agreement?"

Plaintiff's assignor, George Herz & Co., was a partnership. After the performance of the work here involved, it assigned all its assets, including this claim, to the plaintiff corporation.

[1] The defendants Douglas Shay, Frank J. Solt, and Robert F. Garner, Jr., and W. E. Daimwood and a number of other residents of San Bernardino who are not identified were interested in improving Fifth street from Ramona street west to the city limits of San Bernardino. Meetings were held and the four we have named were chosen or acted as directors or managers of what was termed the Fifth Street Improvement Association. Subscription lists were circulated and signed by a number of persons who severally agreed to pay the respective amounts set opposite their names.

It is clear that among themselves the respective obligations of the signers of these subscription lists were several and not joint and several. Moss v. Wilson, 40 Cal. 159; Thomas v. Anderson, 58 Cal. 99; O'Connor v. Hooper, 102 Cal. 528, 36 P. 939.

On August 7, 1931, plaintiff's assignor had the following contract prepared and executed:

"San Bernardino, California
"8/7/31

"Fifth St. Improvement Dist.
"San Bernardino—Calif—

"Gentlemen:—

"We agree to grade and oil Fifth Street from Ramona St. to the west city limits force account cost plus 10% under your direction. It is agreed we will do a minimum of fifteen hundred dollars worth of work or more at your option and hold the City of San Bernardino free of all debts for labor X material.

"George Herz X Co.
"By George C. Herz
"5th St. Imp. Assn.
"W. E. Daimwood, Pres.
"Frank J. Solt, Secy.
"Robert A. Garner, Jr.
"Douglas M. Shaw."

Plaintiff's assignor immediately started the improvement and completed it in about thirty days. It rendered a bill for $3,392.55 and was promptly paid $1,500. It was later paid $775. These payments were made by checks signed by Daimwood on the Fifth Street Improvement Association's account. Plaintiff's assignor also credited the account with an additional $100, the amount of two subscriptions evidently obtained by it. The correctness of the account and of the balance of $1,017.55 unpaid on it is not questioned.

Mr. Daimwood died before this action was instituted, so his testimony was not available to either party.

It is plaintiff's theory that the members of the Fifth Street Improvement Association were partners in the enterprise and were represented by the four directors or managers we have named; that each partner was jointly and severally liable for the debts contracted by their representatives; that these representatives authorized the work to be done under the written contract; and that each member is liable for the unpaid portion of the bill. As an alternative, they urge that if it be held that the contract contained an option that must have been exercised by defendants in order to obligate them for more than $1,500, that Frank J. Solt was on the job almost every day, evidently acting as inspector for the association; that Solt knew or should have known that the work was costing more than $1,500; that, as he permitted it to continue and the association received the benefits from it, its members cannot now escape their obligations to pay the bill.

Plaintiff relies principally on the case of Leake v. City of Venice, 50 Cal.App. 462, 195 P. 440, where an association of individuals staged an automobile race in that city. The court there held that the members of the association were partners in the enterprise and were jointly and severally liable for the unpaid bills. See, also, Sims v. Frew, 24 Cal.App. 725, 142 P. 106; Burrell v. Capt. H. A. Crow Post, etc., 102 Cal. App. 716, 283 P. 370; Case v. McConnell & Forrester, 5 Cal.App.(2d) 688, 44 P.(2d) 414.

[2-4] The parties disagree as to the proper construction to be placed on the contract. Plaintiff contends that it was a contract to construct the portion of the road therein described and that it does not contain an option which must first be exercised by defendants before work in excess of $1,500 should proceed. In weighing this argument we must point out that the writing was prepared by plaintiff's assignor and that, if there be any ambiguity in it that may reasonably bear one of two constructions, the interpretation should be adopted most favorable to defendants who did not prepare the contract and were not responsible for the ambiguity. Witherow v. United American Ins. Co., 101 Cal.App. 334, 281 P. 668. The initial power to construe the contract and determine its true meaning is in the trial judge. If the construction he placed upon it was neither arbitrary nor unreasonable but a fair interpretation of the language used, it should be accepted on appeal. We conclude that on the record the trial judge was justified in holding that the contract contained an option for work in addition to that costing $1,500, which option the defendants might or might not exercise, as they chose.

The evidence on the question of what transpired between plaintiff's assignor and the association directors or managers concerning the amount of work to be done is in sharp conflict and cannot be reconciled. The testimony of George A. Herz, a witness for plaintiff, is clearly to the effect that W. E. Daimwood told him that the work should be completed after some of the directors or managers had been informed that it might cost as much as $4,000. It is admitted that Daimwood, for the association, not only paid $1,500 specified in the contract but an additional $775 that was collected from subscribers. It is also not denied that Solt was on the job almost every day and gave direction as to some of its details and in one instance asked that work be done in addition to that planned by plaintiff's assignor.

The three living members of the committee flatly denied that any of them or Daimwood had authorized any work in addition to that which would cost $1,500.

Garner testified that he told Mr. Herz that the money from subscriptions was not coming in very fast and "not to spend any money that the association did not have and to watch it and be careful about it." Shaw's testimony is to the same general effect.

Solt testified: "We explained to Mr. Herz that we had $1500 in the bank, and that was all we could spend—and we wanted to know just exactly how much it would cost, and it was all in the rough, approximately half a mile, and he said, 'Well, a good job will cost you $4000.' Well, we were in a hurry to get this road through because we had worked and worked on the Board of Supervisors and finally got it over, and then we had got it through the City Council, and we were afraid if we let it go to another meeting we would probably have the action rescinded, and we wanted to get to work immediately. We said, 'Go ahead and open that street; we don't care what you do with it; spend the $1500 and get the street open.' Now, that is what happened."

[5] This testimony presents the familiar situation of a conflict in the evidence on the question of the exercise of the option for additional work. The trial judge believed the evidence of defendants and accepted it as true. Thus the trier of facts resolved the conflict in favor of the defendants. We cannot disturb this finding on appeal.

Defendants have a unique explanation of the payment of the additional $775 and their silence in knowingly permitting the work to be completed after they had been informed that it might cost $4,000. No one knew just where the $775 came from. Mr. Daimwood was the one most interested in the project. He solicited most of the subscriptions and continued this work after the others had desisted. It is assumed that he raised this money after the work was completed and voluntarily paid it to the contractor.

Several witnesses for defendants testified that Mr. Herz told them that he had two agents soliciting subscriptions; that several property owners who had not subscribed to the association were going to pay 50 cents a front foot for their property which fronted on the improvement; that this would give plenty of money with which to complete the contract in a workmanlike manner; that they believed these statements and relied upon them and for that reason did not stop the work.

[6, 7] It is the province of the trial judge to weigh the evidence and within legal limits to determine its sufficiency. He accepted this evidence of defendants as true. Believing it as he did, the trial judge concluded, as he might, that it destroyed the effect of the estoppel that plaintiff sought to invoke.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

---

23 Cal.App.2d 171

PEOPLE v. HENDERSON.

Cr. 426.

District Court of Appeal, Fourth District, California.

Oct. 15, 1937.

Criminal law 🔑1130(4)

Where no one appeared for appellant and no brief had been filed in his behalf, or extension of time therefor requested, or granted, the time within which to file opening brief having expired, motion to affirm judgment under statute was granted (Pen. Code, § 1253).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Proceeding between the People of the State of California and Fred Henderson. From the judgment, the latter appeals.

Affirmed.

Henry W. Hache, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

MARKS, Justice.

The clerk's and the reporter's transcripts were filed in this court on September 8, 1937. The case was regularly calendared for October 14, 1937. No one appeared for appellant and no brief has been filed in his behalf. No extension of time for filing a brief has been asked or granted. The Attorney General moved to affirm the judgment under the provisions of section 1253 of the Penal Code. As the time for filing appellant's opening brief has expired, and as no appearance has been made for him, the motion must be granted.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

---

23 Cal.App.2d 200

PEOPLE v. SOUTHERN PAC. R. CO.

Civ. 1855.

District Court of Appeal, Fourth District, California.

Oct. 18, 1937.

1. Appeal and error ⚷659(3)

Motion for diminution of record to include map which had never been received as an exhibit, was not marked for identification, and had never been identified or in any way authenticated by the proper court officer as having been used or referred to at trial, and which had never been made part of the record, would be refused.

2. Appeal and error ⚷660(2)

Motion for diminution of record to include certain map would be denied where appellant failed to show wherein map in question contained information which would be of assistance in determining the merits of the appeal.

Condemnation proceedings by the People, acting by and through the Department of Public Works, against the Southern Pacific Railroad Company. From the judgment, plaintiff appeals. On plaintiff's motion for diminution of record on appeal.

Motion denied.

Clarence W. Morris, Lincoln V. Johnson, George C. Hadley and Holloway Jones, all of San Francisco, for the People.

McFadzean & Crowe, of Visalia, for respondent.

BARNARD, Presiding Justice.

The appellant has moved for diminution of the record seeking to have a certified copy of a certain map made a part of the record on appeal by order of this court. The map in question is one filed by the respondent with the United States Land Office at Washington, D. C., in September, 1872.

In affidavits filed on behalf of the appellant it is stated that during the argument at the close of the trial in this case counsel for the appellant referred to this map as identifying and describing the respondent's right of way and station reservation in the city of Tulare, and that the same would show that the land sought to be condemned in this action was within such right of way and station reservation, a point which was material to the case; that the appellant requested permission to procure a copy of the map and file the same as an exhibit in the case, which permission was granted by the trial judge; that oral argument was concluded on June 4, 1936, and appellant was given permission to file a brief accompanied by the map to which reference had been made; that a copy of the map was procured and forwarded to the trial judge on July 3, 1936, together with the opening brief; and that subsequently said opening brief and map "were filed by the court with the County Clerk among the record and pleadings" pertaining to said case. A copy of the map is attached to one of the affidavits.

An affidavit filed on behalf of the respondent states that at the time of the argument referred to the appellant did not request permission to file this map as an exhibit and did not receive such permission; that the trial court did permit the appellant to file a written brief in support of its contentions which was accompanied by the map; that this map was never offered or received in evidence as an exhibit; and that the said map was not included in the transcript for the reason that it was never received or offered in evidence as an exhibit or offered or received in evidence in any other manner. It is then stated that this map does not disclose the boundary of the right of way and station reservation of the respondent in the city of Tulare, and that it would be of no assistance to the court in determining the issues presented on this appeal.

[1, 2] So far as here appears the map which the appellant desires to have made a part of the record on appeal was never received as an exhibit, was not marked for identification, and has never been identified or in any way authenticated by the proper court officer as having been used or referred to at the trial. Under these circumstances an appellate court cannot add something to the record which, so far as appears, was never made a part thereof. Ferguson v. Oildale Mutual Water Co., 78 Cal.App. 74, 248 P. 256; Wulferdinger v. Pickwick Stages System, 105 Cal.App. 509, 288 P. 93; In re Guardianship of Carniglia, 134 Cal.App. 106, 24 P.(2d) 944. It may be further observed that the appellant has failed to show wherein the map in question contains information which would be of assistance in determining the merits of the appeal.

The motion is denied.

We concur: MARKS, J.; JENNINGS, J.

---

23 Cal.App.2d 151

McCARTHY v. McCARTHY.

Civ. 10567.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1937.

Hearing Denied by Supreme Court Dec. 13, 1937.

1. Divorce 🔑165(4)

Where final decree of divorce was entered in March, 1918, and plaintiff wife knew thereof, but did not move to set decree aside until March, 1936, after husband's death, denying such motion was not abuse of discretion, where trial court was justified in finding that excuse for delay was insufficiently shown (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

2. Judgment 🔑386(1)

The trial court has inherent power under certain circumstances, but not equivalent duty, to set aside its decrees after expiration of statutory six-month period (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

3. Judgment 🔑386(2)

One seeking to set aside a decree after statutory six-month period must act within a reasonable time, as determined in trial court's sound legal discretion (Code Civ. Proc. § 473, as amended by St.1933, p. 1851).

4. Appeal and error 🔑982(1)

On appeal from order denying motion to set aside decree after expiration of statutory six-month period, question is whether trial court abused its discretion in determining that motion was not made within reasonable time (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action for divorce by Mayzellia Ann Thompson McCarthy against Charles F. McCarthy, wherein, after defendant's death, plaintiff moved to set aside interlocutory and final decrees entered therein. From an order denying the motion, plaintiff appeals.

Affirmed.

R. A. Rogers, of San Francisco, for appellant.

Henry E. Barbour and William B. Backlund, both of Fresno, Paul A. McCarthy, of San Francisco, and Stearns, Luce, Foward & Swing, of San Diego, for respondent.

SPENCE, Acting Presiding Justice.

This is an appeal from an order of the trial court denying plaintiff's motion to set aside the interlocutory and final decrees entered in an action for divorce.

The interlocutory decree was entered on February 21, 1917, and the final decree was entered on March 8, 1918. Plaintiff claims that the final decree was "secretly entered" after the parties had resumed marital relations. It appears, however, from the recitals in said final decree that it was entered upon "the motion of the attorney for plaintiff." It further appears that on May 21, 1918, plaintiff made an affidavit charging defendant with contempt of court and that in said affidavit plaintiff alleged "that on or about March 8th, 1918, said final decree was signed and entered herein." The defendant died on June 27, 1935, and it was not until March 16, 1936, that plaintiff filed her notice of motion seeking an order setting aside said decrees. Plaintiff attempted to show by the affidavits accompanying her motion that the final decree had been obtained through fraud, but the trial court denied the motion, and it appears from the opinion of the trial court that it based its action upon the ground that the motion had not been made within a reasonable time.

[1-4] We find no error in the trial court's ruling. Plaintiff cites and relies upon McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 46, 40 A.L.R. 1110, and other authorities holding that under certain circumstances the trial court has the inherent power to set aside its decrees after the expiration of the six-month period provided by section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851). This may be conceded, but the measure of the power is not necessarily the measure of the duty of the trial court. As indicated in the McGuinness Case, a party seeking to set aside a decree after the six-month period has elapsed must act within a reasonable time and, if a party fails to act within a reasonable time, the trial court is under no duty to grant the motion to set aside the decree, and the moving party may not complain of the trial court's ruling denying the motion. As stated at page 232 of 196 Cal., 237 P. 42, 46, 40 A.L.R. 1110, in the McGuinness Case, "What is a reasonable time is a matter of sound legal discretion in the court in which the motion is made." See, also McKeever v. Superior Court, 85 Cal.App. 381, 384, 259 P. 373. In the event of a denial of the motion, the question before the court on appeal is whether the trial court abused its discretion in determining that the motion was not made within a reasonable time.

It cannot be said that the trial court abused its discretion in making such determination in the present case. The final decree of divorce was entered in March, 1918, being shortly after the expiration of the year following the entry of the interlocutory decree. If the final decree was not entered on motion of plaintiff's attorney, as shown by the record, it appears that plaintiff had actual knowledge of the entry thereof in May, 1918, when she alleged the entry thereof in her affidavit charging defendant with contempt. Her motion to set aside said decree was not filed until March, 1936, almost eighteen years after plaintiff admittedly had knowledge of the entry of the final decree and over eight months after the death of defendant. While plaintiff set forth in her affidavits certain facts for the purpose of showing an excuse for her long delay, the trial court was justified in concluding that the showing was wholly insufficient for that purpose.

The order is affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

---

23 Cal.App.2d 135

WOODMAN et al. v. PACIFIC INDEMNITY CO.

Civ. 1677.

District Court of Appeal, Fourth District, California.

Oct. 11, 1937.

1. Insurance 🔑616½

In action against insurer to recover amount of judgment had against scoutmaster under liability policy naming scoutmasters of particular Boy Scout organizations as assured, showing that jury found for Boy Scout organization and against scoutmaster in prior action could not be taken as conclusive that scoutmaster was not acting in official capacity so as not to be covered by policy, since as a scoutmaster he might have been so acting without imposing liability on those organizations.

2. Insurance 🔑616½

In action against insurer to recover amount of judgment obtained against scoutmaster under liability policy naming scoutmasters of particular Boy Scout organizations as assured, where judgment against scoutmaster individually in prior action had no bearing on whether he was acting as scoutmaster at the time of alleged negligent acts, refusal to permit plaintiffs to introduce evidence showing that scoutmaster was acting as such at time of negligent acts, so as to bring him within class of assured, on ground that former judgment was conclusive as showing that scoutmaster was acting in individual capacity, was error.

3. Insurance ⇨616½

Ordinarily, judgment might be obtained against defendant personally, although he is acting as agent for another, and, if his principal is covered by a policy naming the agent as one of the class of assured, judgment creditor could sue the insurer and would be entitled to show, if such was the fact, that the agent was included in the class named among the assured in the policy and was also covered.

Appeal from Superior Court, Riverside County; F. A. Leonard, Judge.

Action by Rena Woodman and Donald Woodman, a minor, by Rena Woodman, his guardian ad litem, against the Pacific Indemnity Company, a corporation. Judgment for the defendant, and plaintiffs appeal.

Reversed.

Fred L. Hamblin and Albert H. Ford, both of Riverside, for appellants.

Sarau & Thompson, of Riverside, for respondent.

BARNARD, Presiding Justice.

The minor plaintiff was injured while engaged with several other boys, who were members of a Boy Scout troop, in hauling some rock and sand to be used in building a fireplace at the scout barracks. The boys were using an old truck belonging to the school which they attended, and in a former action for damages resulting from this injury Hemet Union High School District, Riverside Council of Boy Scouts, and the Troop Committee of Hemet Troop 47 of Boy Scouts, were joined as defendants with W. J. Austin, who was a teacher in that school and also scoutmaster of that troop. It was alleged in the complaint in that action that Austin was scoutmaster of said troop and that on the day in question he had, as servant and agent of the other defendants and as such scoutmaster, requested, authorized, and directed these boys to go in this truck for the purpose of securing a load of stone to be used in constructing a fireplace at the scout barracks. This was denied by the defendants. A jury brought in a verdict in favor of the Riverside County Council of Boy Scouts and of the Troop Committee and in favor of the plaintiffs as against the school district and W. J. Austin. On appeal, the judgment was reversed as to the school district. Woodman v. Hemet Union High School Dist., 136 Cal.App. 544, 29 P.(2d) 257.

After the judgment against Austin became final, the plaintiffs brought this action to recover the amount of the judgment on the theory that Austin was covered as to this liability under a policy which had been issued by the defendant. This policy named as the assured thereunder "Riverside County Council of Boy Scouts of America and/or its Sponsoring Organizations, Committeemen and Scout Masters." The complaint in this action sufficiently alleged that Austin was scoutmaster of this particular troop and acting as such at the time of the acts complained of in the original action. The answer admitted that Austin was the duly selected and designated scoutmaster of Hemet Troop No. 47 of Boy Scouts, but denied that the liability represented by the judgment arose while he was acting as such scoutmaster. It was admitted by the pleadings that the respondent had notice of the former action and that it employed attorneys who appeared for and defended Austin throughout that action. The court found that it was not true that the judgment was obtained by reason of the liability for said injuries imposed by law upon the said W. J. Austin while acting as such scoutmaster. Judgment was entered in favor of the defendant, and the plaintiffs have appealed.

[1] The controlling question presented is whether the court erred in refusing to permit the appellants to introduce evidence which was offered to the effect that Austin was acting as scoutmaster at the time of the negligent acts, for which he was held liable. The respondent's position is thus stated: "The judgment in the former case is now final, and we submit that the court here can look only to the judgment, and that the judgment on its face shows that it is against Austin in his individual capacity and not against him in any representative capacity." The trial court adopted this theory that the prior judgment was controlling and that the matter of the capacity in which Austin was acting at the time could

not be gone into in this action, since it did not appear on the face of the judgment.

In our opinion, the court erred in rejecting the proffered evidence. A judgment had been entered against Austin, and the only real question in the present action is as to whether he was covered under the policy which had been issued by the respondent. If, in committing the acts of negligence, he was acting as a scoutmaster, he was covered as a member of a class named among the assured. Whether or not he was so covered was not material in the other action. The fact that the jury found in favor of the two Boy Scout organizations cannot be taken as a finding that Austin was not acting at the time as a scoutmaster, as he might have been so acting without imposing liability on those organizations. Young v. Boy Scouts of America, 9 Cal.App.(2d) 760, 51 P.(2d) 191. Under the circumstances, the judgment entered against Austin had no bearing on the question as to whether he was acting as scoutmaster at the time, and is not conclusive on the issue here raised as to whether he was included as an assured under this policy.

[2, 3] In the present action the question of whether or not Austin was acting in the capacity of a scoutmaster when he performed the acts which constituted negligence is both material and essential, in order to determine whether or not he was included in the classes named as the assured in the policy and covered thereby. In the ordinary action judgment might be obtained against a defendant personally although he was, at the time, acting as the agent of another. If his principal was then covered by a policy such as the one involved here the judgment-creditor could sue the insurer and would then be entitled to show, if such was the fact, that the agent was included in a class named among the assureds in the policy and was also covered. While the judgment with which we are here concerned was against Austin personally, the appellants were entitled to show, if they could, that he was covered by this policy. The former judgment was not conclusive on that point, and it was error to refuse to permit the appellants to introduce evidence for the purpose of showing that he was at the time acting in a capacity which brought him within the protection of the policy.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

---

23 Cal.App.2d 187

In re WOODS' ESTATE.

SUMMERS v. WOODS.

Civ. 11594.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1937.

Rehearing Denied Nov. 10, 1937.

Hearing Denied by Supreme Court Dec. 16, 1937.

1. Trial ⚷404(2)

The superior court's statement under heading, "Conclusions of Law," that order should be rendered, adjudging that certain properties were community property of deceased and his wife, should have been placed among court's fact findings after hearing on widow's petition for distribution and objections thereto.

2. Appeal and error ⚷907(3)

The trial court's fact findings are conclusively presumed to be supported by evidence, where appeal is on judgment roll alone.

3. Appeal and error ⚷907(3)

The trial court's fact findings must be so construed as to uphold, rather than defeat, court's order, if possible, where appeal is on judgment roll alone.

4. Appeal and error ⚷907(3)

The trial court's fact findings must be liberally construed and any ambiguity or inconsistency resolved in favor of sustaining court's order on appeal on judgment roll alone.

5. Appeal and error ⚷907(3)

Every presumption and intendment is resolved in favor of regularity of trial court's proceedings on appeal on judgment roll alone.

6. Appeal and error ⚷544(3)

The trial court's order will not be reversed on appeal on judgment roll alone, except for fatal error appearing on face of judgment roll.

7. Husband and wife ⚷262(2)

All of separate and community property, so commingled that it is impossible to trace funds, will be treated as community property on principle that burden is on party claiming that property is separate property to establish its character as such.

8. Husband and wife ⚷264

The trial court's findings, that husband and wife owned property as joint tenants, that it was sold and proceeds placed in bank account, that husband earned substantial sums placed in bank account, from which funds were taken to erect building and release mortgages on certain land, that he deposited sums from community properties in such account, and that such funds were so commingled that court could not identify separate and community properties, were sufficient to uphold court's order for distribution of community property to wife after husband's death.

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

In the matter of the estate of Timothy L. Woods, also known as T. L. Woods, deceased. From an order for distribution of the community property of deceased and his widow, Hattie E. Woods, to the latter on her petition, to which Harold D. Summers, administrator of the estate of Reverdia Lee Summers, deceased, filed objections, the objector appeals.

Affirmed.

Samuel R. Davis, of San Francisco, and Franklin P. Bull and George F. Talbot, both of Los Angeles, for appellant.

Pease & Dolley, Roy P. Dolley, and Adolph H. Levy, all of Los Angeles, for respondent.

WOOD, Justice.

This is an appeal from an order by which the superior court determined that certain parts of the estate of Timothy L. Woods, deceased, was community property. The appeal is upon the judgment roll alone.

Timothy L. Woods and Hattie E. Woods were married in the year 1908 in the state of Oklahoma and two daughters were born to them. One of the daughters, Reverdia Lee Woods, who was born on March 23, 1910, was married to Harold D. Summers on March 6, 1933. She died on July 11, 1935, leaving surviving her as her heirs at law her husband and a son. Harold D. Summers was appointed administrator of her estate, and as such is the contestant and appellant herein. On August 27, 1917, Timothy L. Woods made his will by which he left all of his estate to his wife. No mention of Reverdia Lee Woods was made in the will. The other daughter was born after the execution of the will. Hattie E. Woods was appointed administratrix with the will annexed. For a number of years Mrs. Woods made no accounting to the court, and on November 26, 1935, she filed a petition for distribution to which the appellant filed objections. The court determined that some of the property left by the decedent was community property and that some of it was separate property. As to the separate property, it was ordered that the administratrix file an accounting and that she file a petition for distribution thereof in accordance with section 221 of the Probate Code. The community property was ordered distributed to Hattie E. Woods, and the appeal is taken from the order distributing the community property.

From the findings it appears that Mr. and Mrs. Woods acquired considerable property while residing in Oklahoma; that they conducted a store and acquired both business and ranch property in that state. In March, 1921, they moved to California. It is conceded that under the laws of Oklahoma all of the property acquired in that state was the separate property of the decedent and that when this property or its proceeds was brought to California it remained his separate property.

The most important property affected by the appeal appears to be that known as the Central avenue property. The facts concerning this property are essentially the same as the facts concerning other properties decided to be community property. A statement of the facts concerning the Central avenue property is sufficient for the purposes of appeal.

About a year before coming to California, while on a visit, the decedent purchased the Central avenue property for the sum of $40,000, paying $15,000 cash and giving a mortgage executed by himself and wife to secure their notes for the sum of $25,000. In August, 1921, the mortgage was refinanced by a loan of $20,000 from the California Bank in return for which the parties gave their deed of trust on the property to secure payments of several notes payable at future dates. This deed of trust was released in February, 1927. During this period two separate bank accounts were maintained. Upon his arrival in California Mr. Woods entered into a general real estate, insurance, and brokerage business and as a result of his work he earned substantial sums of money, the exact amount of which could not be determined from the evidence, but the earnings were in excess of his needs in maintaining his family. Into the same bank accounts were placed proceeds from the sale of Oklahoma property, income from properties purchased in California, income from the proceeds of sales of properties purchased in joint tenancy in California in the names of Mr. and Mrs. Woods, and also the earnings of Mr. Woods after he came to California. Out of the bank accounts there were paid sums to release the mortgage and deed of trust on the property in question, the cost of erecting a two-story office and garage building thereon, "the price of all properties acquired in the name of decedent after the parties came to California, all taxes, expenses of upkeep and repair on said property, the living expenses of the parties, and the expenses of the decedent's real estate, insurance and brokerage business." The court further found that as a result of these transactions "the funds thus acquired in Oklahoma have been so commingled, mixed and confused with other funds acquired as community property in California that it is impossible for the court to identify or determine which portion thereof is funds brought here from Oklahoma and which part thereof constitutes the earnings and other moneys acquired by Timothy L. Woods and Hattie E. Woods in California as community funds; and such moneys originating in Oklahoma as have passed through said accounts over said period of time cannot be traced or distinguished from other funds acquired by said parties while residing in California as the result of the earnings of Timothy L. Woods and the work and efforts of said parties in California."

[1] Under the heading, conclusions of law, the following appears: "That an order should be rendered in this cause adjudging and declaring that the following described properties were, at the time of the death of Timothy L. Woods, the community property of Timothy L. Woods and Hattie E. Woods, his wife (enumerating the parcels)." This statement should have been placed among the findings of fact. It is said in Re Estate of Hill, 167 Cal. 59, 63, 138 P. 690, 692: "But an allegation or finding that a person is the owner of certain property is none the less an allegation or finding of an ultimate fact. Smith v. Acker, 52 Cal. 217; Murphy v. Bennett, 68 Cal. 528, 9 P. 738; Gill v. Driver, 90 Cal. 72, 27 P. 64. And the same considerations apply to an averment or finding that certain property owned by a married person is separate or community property. The evidence from which this ultimate fact is determined is not to be set forth in a pleading, nor need it be found by the court." In Maskuns v. Maskuns, 93 Cal. App. 27, 268 P. 1093, 1094, it was held that the trial court determined an ultimate fact when among the conclusions of law it decreed "that the remaining one-half of said property is the community property of this plaintiff and defendant." It was pointed out that "a finding of fact loses none of its force merely because it has been inadvertently included among the conclusions of law." Matter of Forrester, 162 Cal. 493, 123 P. 283. In the case before us it was the duty of the court to determine whether the property in question was separate property or community property, and it is manifest that the court in making such determination was making the finding that the property subject to the appeal was in fact community property.

[2-8] Since the appeal is on the judgment roll alone the findings are conclusively presumed to be supported by the evidence; they are to receive, if possible, such a construction as will uphold rather than defeat the order of the court; they must be liberally construed and any ambiguity or inconsistency must be resolved in favor of sustaining the order. On such an appeal every presumption and intendment is resolved in favor of the regularity of the proceedings in the trial court. The order of the court will not be reversed except for some fatal error appearing on the face of the judgment roll. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.(2d) 5. The trial court expressly found that the parties owned property in joint tenancy in California which was sold and the proceeds placed in the bank account; that the decedent earned substantial sums in his business in California; that these sums were placed in the bank account from which were taken funds to erect the office building and release the mortgage and trust deed; that into the bank account "he also deposited sums from community properties"; that all these funds were so commingled that it was impossible for the court to identify or determine what part was separate property and what part was community property. The rule is well stated in Fountain v. Maxim, 210 Cal. 48, 51, 290 P. 576, 577: "It has also long been the rule in this state that, where separate and community property are so commingled that it is impossible to trace the funds, the

whole will be treated as community property, upon the principle that the burden is upon the party claiming property is separate property to establish its character as such." The findings made by the trial court are sufficient to uphold the order for distribution.

The order is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

23 Cal.App.2d 141

PEOPLE v. BURKE.

Cr. 1978.

District Court of Appeal, First District, Division 2, California.

Oct. 13, 1937.

1. Criminal law 🔑998

A judgment which is void upon its face, as an inspection of the judgment roll reveals, may be set aside upon motion at any time, but it is only in such case that judgment may be attacked after time for new trial and appeal has passed.

2. Criminal law 🔑998

Where judgment appeared regular on its face and no invalidity appeared from inspection of judgment roll, motion to set aside judgment, made six years after entry thereof, for alleged defect in information which could have been cured by demurrer instead of which a plea of not guilty was entered, without thereafter moving in arrest of judgment or for new trial or appealing, was properly denied.

◆

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

James Fred Burke was convicted of violating statute relating to passing or receiving of forged notes, and statute relating to making or possessing counterfeit dies or plates. From an order denying his motion to set aside judgment of conviction and sentence on second count, he appeals.

Affirmed.

James Fred Burke, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Acting Presiding Justice.

In 1931, defendant was convicted of violations of sections 475 and 480 of the Penal Code. Judgment of conviction was entered sentencing defendant on the two counts, and the trial court ordered that the sentences run consecutively. No appeal was taken, but in January, 1937, defendant made a motion in the trial court seeking to set aside the judgment of conviction and sentence on the first count. The motion was denied and the order denying the same was affirmed on appeal. People v. Burke (Cal.App.) 70 P.(2d) 953. During the pendency of said appeal defendant made a second motion in the trial court seeking to set aside the judgment of conviction and sentence on the second count. Said motion was likewise denied and defendant has appealed from the order denying his second motion.

[1, 2] It may be conceded, as contended by appellant, that where a judgment is void upon its face and its invalidity appears from an inspection of the judgment roll, such judgment may be set aside upon motion at any time, but it is only in such a case that the judgment may be attacked after the time for a new trial and appeal has passed. People v. Howard, 7 Cal.App.(2d) 283, 46 P.(2d) 268; People v. Russell, 139 Cal.App. 417, 34 P.(2d) 203; People v. Burke, supra. In the present case, the judgment itself is in all respects regular on its face and no invalidity appears from an inspection of the judgment roll. The alleged defect in the information could have readily been cured in the event that appellant had demurred thereto. He did not demur but entered a plea of not guilty to both counts. Thereafter he did not move in arrest of judgment or for a new trial. On the contrary, he stated through his counsel that there was no legal cause why judgment should not be pronounced against him, and he took no appeal. His motion to set aside the judgment, made six years after the entry thereof, was therefore properly denied. People v. Burke, supra.

The order appealed from is affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

23 Cal.App.2d 142

SPELLACY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 11461.

District Court of Appeal, Second District, Division 1, California.
Oct. 13, 1937.

1. Dismissal and nonsuit ⟹14

A plaintiff has absolute right under statute to dismiss his action at any time before submission, upon payment of legal fees, if there is no claim by defendant for affirmative relief (Code Civ.Proc. § 581, subd. 1, as amended by St.1935, p. 1954).

2. Dismissal and nonsuit ⟹14

A plaintiff in minority stockholders' suit who, after defendants had moved to amend their answer to pray declaratory relief and parties had stipulated that motion should be deemed submitted to vacate any written dismissal filed by plaintiff, filed motion to dismiss, thereby waived his right to dismiss summarily by filing request for dismissal with clerk, since he thereby invoked court's jurisdiction to make an order on the motion (Code Civ.Proc. § 581, subd. 1, as amended by St.1935, p. 1954).

3. Dismissal and nonsuit ⟹14

A plaintiff in minority stockholders' suit brought on behalf of corporation, wherein corporation was real party in interest though joined as nominal defendant, could not dismiss action in his fiduciary capacity as respects corporation, without first receiving sanction of trial court (Code Civ.Proc. § 581, subd. 1, as amended by St.1935, p. 1954).

◆

Proceeding in prohibition by P. E. Spellacy against the Superior Court of the State of California, in and for the County of Los Angeles, and William J. Palmer, judge thereof, to restrain further proceedings in trial of a minority stockholders' suit.

Alternative writ of prohibition dissolved, and petition for writ of prohibition denied.

Sidney A. Moss and John Dales, Jr., both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, and Stewart, Shaw & Murphey, all of Los Angeles (Alvin B. Shaw, Jr., and William L. Murphey, both of Los Angeles, of counsel), for respondents.

YORK, Acting Presiding Justice.

This is a proceeding in prohibition to restrain respondents from proceeding further with the trial of a minority stockholders' suit, petitioner claiming to have dismissed the action under his absolute right to do so, pursuant to subdivision 1, § 581, Code of Civil Procedure (as amended by St.1935, p. 1954), to wit: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff, by written request to the clerk, filed with the papers in the case * * * at any time before the trial, upon payment of the costs of the clerk or justice; provided that a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant."

The record before us consists of the petition for alternative writ of prohibition, the answer thereto accompanied by a book of exhibits, and petitioner's brief. It is thereby shown that the action herein was brought by plaintiff (petitioner here) "as a stockholder of Ambassador" Petroleum Company (hereinafter referred to as Ambassador) "for and on behalf of Ambassador and on behalf of all the other stockholders" thereof, against said Ambassador and against the Wilshire Oil Company, Inc. (hereinafter referred to as Wilshire), George L. Machris and Alfred Machris, majority stockholders of Ambassador, maintaining that as such majority stockholders they were committing fraud upon the Ambassador and therefore upon petitioner and the other minority stockholders. Plaintiff sought an accounting between Wilshire and the Machris brothers on one hand and Ambassador on the other, and prayed that Ambassador recover from the other defendants a large sum of money. It appears that the complaint set up nine causes of action attacking as constructively fraudulent the reasonableness and fairness of business transactions had between Ambassador and Wilshire in various particulars, to wit: As to methods of sampling, testing and accounting used in the sale and purchase of crude petroleum oil; the percentage and price paid by Wilshire to Ambassador for casinghead gasoline manufactured from Ambassador's wet gas; the charges made by Wilshire and paid by Ambassador for office and field facilities and services rendered and furnished, and charges for dry gas supplied by Wilshire to Ambassador. It appears that the first and ninth causes of action involved transactions which occurred and terminated prior to May 16, 1931; that the transactions complained of in the other seven causes of action commenced either in October, 1925, or November, 1926, and continued to the date of trial; that each of said transactions had a contractual foundation; and that numerous issues of fact and law were joined as to the rights, duties, and obligations of defendant companies each to the other under each of said contracts; the answer to the complaint, as amended, containing a prayer for general relief. It is also shown that on January 6, 1937, the trial was commenced and proceeded until February 16, 1937, when defendants made a motion for a direction of the order of proof to hear all evidence and issues upon the statute of limitations and laches, which motion was granted and the trial thereof proceeded until March 31, 1937, at which time the trial court made its decision upholding the 3-year statute of limitations. It then appears that on April 12, 1937, after the trial had been conducted for over 3 months and the said issues of the statute of limitations and laches had been submitted and decided, defendants made a motion for leave to amend their answer by the interlineation in the prayer thereof of the following: "* * * That this Honorable Court declare the rights and duties of the defendants each to the other, under each of the contracts herein alleged or admitted as to all transactions occurring thereunder from and after May 16, 1931. * * *"

Said motion was argued and submitted; plaintiff then moved the court to dismiss said action, which motion was opposed by defendants, argued at length, and submitted. Immediately thereafter it was stipulated that if plaintiff should file with the clerk of the court a written dismissal of the action or instruction to the clerk to enter a dismissal, thereupon there would be deemed to be before the trial court, to be decided by it, a motion by all defendants that said written dismissal or instruction for the entry of dismissal be stricken from the files and that any entry the clerk might make pursuant thereto be vacated. On the afternoon of the same day, plaintiff through his counsel caused to be delivered to the clerk of the court a written instrument captioned "Request for Dismissal" instructing said clerk to enter dismissal of said action without prejudice. Said clerk entered upon his register of actions the fact that said request for dismissal was filed, but he made no entry of dismissal and made no entry upon his docket or register of actions of any dismissal of said action.

On the following day, April 13, 1937, the motion of defendants for leave to amend their answer was granted; plaintiff's motion for dismissal was denied and the written request for dismissal stricken from the files and the clerk ordered not to enter a dismissal of the action. The court then proceeded with the trial of the action, although plaintiff refused to continue and took no part therein, and on April 26, 1937, the court announced its decision in favor of defendants and directed the preparation of findings of fact, conclusions of law, and judgment as prayed for by defendants. Petitioner by this proceeding seeks to prevent the respondent court from entering such findings, conclusions, and judgment.

An alternative writ of prohibition was issued by this court, and petitioner now asks that it be made peremptory upon the ground that he "had a right to dismiss the action when plaintiff attempted to so do, and that his action at that time resulted in a dismissal of the action and a loss of jurisdiction of the Superior Court to continue therewith."

[1] While it is true that under section 581 of the Code of Civil Procedure (as amended by St.1935, p. 1954) "a plaintiff has an absolute right to dismiss his action at any time before submission of the case, upon payment of the legal fees for entering judgment, if there is no claim by defendant for affirmative relief" (9 Cal.Jur. 507, § 3), it should here be noted that plaintiff's request for dismissal was not filed with the clerk until *after* the court had taken under submission (1) the motion of defendants to amend their answer by setting out therein a prayer for declaratory relief; (2) motion of plaintiff to dismiss the action; and, further, a stipulation had been entered into to the effect that if plaintiff should file a written dismissal, a motion be deemed to have been duly made to vacate the same and that such motion also be deemed submitted for the trial court's decision.

[2] In these circumstances, it would seem apparent that by his motion to dismiss, which was submitted without objection on his part, together with his acquiescence in the stipulation above referred to, plaintiff waived his right to thereafter

summarily dismiss the action. In 9 California Jurisprudence § 7, at page 514, it is stated that the method for procuring a dismissal outlined by subdivision 1, § 581, Code of Civil Procedure, "is not exclusive or mandatory. And there is no objection to the plaintiff's making a motion to the court for an order of dismissal which, when entered, should be noted by the clerk in his register of actions." Also: "While plaintiff had an absolute right to dismiss the action, such right could be exercised only in the mode or manner prescribed by the statute; in other words, the right is measured by the mode provided for its exercise. When, instead of pursuing the statutory mode, it, by motion made in open court, invoked the inherent power of the court in the exercise of which it was asked to make an order dismissing the case, the making of an order either granting or denying the motion was within the exercise of the jurisdiction of the court." Huntington Park Co. v. Superior Court, 17 Cal.App. 692, 694, 121 P. 701.

[3] The point, among others, is urged by respondents in opposition to the petition here under consideration that a minority stockholders' suit brought on behalf of the corporation is of a peculiar and unusual character in which the plaintiff is only a nominal party, and the corporation is the real party in interest, even though joined as a nominal defendant, and a court of equity is vested with the sole authority to determine whether the action shall be dismissed.

This finds support in the case of Whitten v. Dabney, 171 Cal. 621, 154 P. 312, 314, where the plaintiffs, as stockholders of Dabney Oil Company, sued defendants, alleging fraudulent impositions practiced by them upon the said company, as well as their control thereof through its board of directors carried on pursuant to a conspiracy, all of which resulted in a great loss to the company. Plaintiffs there asked for an accounting on behalf of the company, together with recovery of the amount of which the said company had been defrauded. It is there stated, 171 Cal. 621, at pages 624, 625, 154 P. 312, 314: "Plaintiffs are allowed to prosecute this action by virtue of their stockholder's relationship to the corporation, but only for the purpose of redressing wrongs and impositions which the corporation itself had suffered. * * * These stockholders, as plaintiffs, therefore occupied a strict fiduciary relationship to the corporation whose interests they were representing. Their position may not inaptly be compared to that of a guardian ad litem." Again, 171 Cal. 621, at pages 630-632, 154 P. 312, 316: "These plaintiffs have no personal wrongs for which they are entitled to seek redress in this action. * * * What is the exact situation of a plaintiff in such an action? He is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other. His position in the litigation is in every legal sense the precise equivalent of that of the guardian ad litem. * * * He has gone into equity seeking redress for a corporation under disability to obtain relief itself, precisely as the guardian ad litem goes into court to obtain like redress for a client under disability. * * * The principles governing the conduct of a guardian ad litem are in full strictness applicable to the conduct of such a plaintiff stockholder. *Not only should a plaintiff in such a fiduciary capacity be willing to take no act that did not first receive the sanction of the court of equity to which he has appealed, but, more than this, he is not permitted to take any act without such sanction.* Waterman v. Lawrence, 19 Cal. 210, 79 Am.Dec. 212. * * * The court and not the guardian ad litem has the power to compromise the rights of minors under suitable circumstances. So far, therefore, as this motion to dismiss is concerned it is not even properly before this court for consideration." (Italics ours.) See, also, Loeb v. Berman, 217 Cal. 716, 720, 20 P.(2d) 685, and Russell v. Weyand, 5 Cal.App.(2d) 259, 42 P.(2d) 381.

We therefore conclude that petitioner waived his right to dismiss the action as to himself, and that he could not dismiss the action in his fiduciary capacity as to the corporation until he had first received the sanction of the trial court.

Since this is determinative of the proceeding before us, we deem it unnecessary to pass upon the other points raised.

The alternative writ is dissolved and the petition for writ of prohibition is denied.

I concur: DORAN, J.

9 Cal.2d 716

GORDOY v. FLAHERTY et al.

S. F. 15824.

Supreme Court of California.
Oct. 18, 1937.

Rehearing Denied Nov. 15, 1937.

1. Automobiles ⚷197(7)

A service station attendant who drove his own automobile to bank to get change, intending to proceed to station owner's branch office to leave his money, and collided with another automobile after having driven past office in direction of home of fellow employee's mother, whom attendant had picked up, was not acting "within scope of employment," but had departed therefrom, even though attendant intended to return to owner's business, and during such departure owner was not liable for attendant's negligence.

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

2. Automobiles ⚷243(12)

In determining whether service station attendant was within scope of employment at time of automobile collision, which occurred while attendant was taking fellow employee's mother home, while on uncompleted errand for station, fact that attendant had not been expressly warned against driving members of other employees' families to their homes was immaterial, where there was no evidence that station owner had any knowledge that attendant had previously engaged in practice.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Emile Gordoy against Rex Flaherty, the Union Oil Company, and another. From a judgment for plaintiff, the Union Oil Company appeals.

Reversed.

Prior opinion, 64 P.(2d) 179.

Frank V. Campbell, L. H. Schellbach, and Walter E. Rankin, all of San Jose (Robert E. Hayes, of San Jose, of counsel), for appellant.

Jensen & Holstein and Robert E. Cassin, all of San Jose, for respondent.

PER CURIAM.

This is an action for damages for personal injuries. Plaintiff's automobile collided with a car driven by defendant Flaherty at the intersection of Stockton avenue and Polhemus street in the city of San Jose. The evidence sufficiently establishes the negligence and liability of defendant Flaherty. The issue raised by this appeal is as to the liability of the other defendant, appellant Union Oil Company. Flaherty was employed by the company as a service station attendant, and the question is whether he was acting within the scope of his employment. The verdict and judgment were for the plaintiff, and defendant Union Oil Company appealed.

[1] The facts are not disputed. As part of his duties Flaherty was occasionally required to go into town to get change, and also to turn in money to the branch office of the company. There was no route prescribed for these errands. Just before noon on the day of the accident, Flaherty took his own automobile and drove to the bank to get change, intending thereafter to proceed to the branch office of the company to leave his money. While he was stopping at the bank, Mrs. Frantz, mother of a friend and fellow employee, asked him to take her to her home in Santa Clara, a few miles away from San Jose. He agreed, and, after assisting her into the car with her parcels, he proceeded to drive on toward the company office. But instead of stopping there, he kept on driving in the direction of her home. The collision took place three blocks past the office.

It seems perfectly clear that at the time of the accident Flaherty had departed from his employment and was performing services for another, outside its scope. This is not a case of a choice of different possible routes, or minor or immaterial deviations in the course of business errands. If Flaherty had taken Mrs. Frantz as a passenger, and driven her to some point between the bank and the branch office, or had even deviated by a short distance from the most direct route, it might still be held that he was within the general scope of his employment at the time of the accident. Gayton v. Pacific Fruit Express Co., 127 Cal. App. 50, 15 P.(2d) 217; Restatement, Agency, §§ 234, 236. But it was not a mere deviation when he actually passed the company office and proceeded in the direction of a place which had no relation to the company business. This was a real departure from the employment, despite the fact that he intended subsequently to return to his employer's business; and during such departure the employer was not liable for the employee's tort. See Kish v. California State Automobile Association, 190 Cal. 246, 212 P. 27; Fiocco v. Carver, 234 N.Y. 219, 137 N.E. 309; Sauriolle v. O'Gorman, 86 N.H. 39, 163 A. 717; Restatement, Agency, §§ 234, 237.

[2] It is also urged in support of the judgment that driving members of other employees' families to their homes was a customary courtesy extended by employees of the company, and that the company had never raised any question about it nor given any orders against it. The record, however, simply indicates that no warnings had ever been given defendant Flaherty, and it does not show that the company ever countenanced the practice. On the contrary, the employer's superintendent testified that the employees had no such authority, and that those who had assumed it had been cautioned. There is no evidence that the company had any knowledge that Flaherty had previously engaged in the practice, and therefore it is immaterial that he was not expressly warned against it.

The judgment is reversed.

9 Cal.2d 705

CITY OF LOS ANGELES v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 16310.

Supreme Court of California.

Oct. 11, 1937.

1. Workmen's compensation ⚿203, 347

Where owner of steam shovel contracted with federal government for use of steam shovel and crew on Works Progress Administration project of which city was cosponsor, but owner had no contract with city, owner was an "independent contractor" and city was not a "special employer" of member of shovel crew hired by owner, who was injured during project, so as to be liable for compensation, notwithstanding that city exercised some control over crew and federal government expressly contracted that crew were not government's employees (Workmen's Compensation Insurance Act, St.1917, p. 831, as amended; Federal Emergency Relief Appropriation Act of 1935, 15 U.S.C.A. § 728 note).

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

2. Municipal corporations ⚿228

A Works Progress Administration contract of which city was cosponsor, and had benefit by contributing small part of expense and services of superintendent and small number of employees, was under regulations of Emergency Relief Administration and was not city work, so as to impose liability on city for compensation for injuries sustained by member of steam shovel crew, since purpose of relief statute was not to benefit particular locality but to provide unemployment relief (Federal Emergency Relief Appropriation Act of 1935, 15 U.S.C.A. § 728 note).

In Bank.

Proceeding under the Workmen's Compensation Act on behalf of the City of Los Angeles to review an order of the Industrial Accident Commission awarding compensation to Don Christensen, a minor.

Award annulled.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Bourke Jones and Floyd S. Sisk, Deputy City Attys., all of Los Angeles, for petitioner.

Everett A. Corten and Eldon B. Spofford, Asst. Atty., both of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM.

This is a proceeding on behalf of the City of Los Angeles to have reviewed an order of the Industrial Accident Commission awarding compensation.

In 1935 the City of Los Angeles became cosponsor of a Federal Works Progress Administration project whereby roads and firebreaks were to be constructed in the Santa Monica mountains to facilitate the moving of vehicles and fire extinguishing apparatus into this area, with a view to minimizing the hazard of brush fires in that locality. Under the plans for the project the federal government advanced about 94 per cent. of the moneys needed therefor, the city advancing the other 6 per cent. It was the understanding between the city and the government that the city should draw up the plans and specifications for the work, subject, however, to the approval of the federal government. After the plans were drawn up and approved it was found that a gasoline power shovel would be needed in connection with the work. The government accepted bids for this contract and awarded the same to Mrs. Jeanne Robare, the owner of the shovel here involved. Under her contract Mrs. Robare was to receive a stipulated sum of money monthly, to be paid by the federal government for the use of her shovel. She was to furnish the men needed to operate the shovel and to fix and pay for their services. This contract provided further that the workmen on the shovel were to become the employees of Mrs. Robare and not of the federal government. She was also required to procure and maintain compensation insurance covering the men employed in the operation of the shovel.

During the course of the work the oiler, one of the two men comprising the shovel crew, suffered injuries arising out of and in the scope of his employment which resulted in the amputation of one of his legs. The owner of the shovel, the federal government, and the city were joined as defendants. At the hearing, the action was dismissed as to the federal government upon the grounds that the commission had no jurisdiction over such body. The owner of the shovel and the city being the two remaining defendants, the award was made against the owner as general employer and against the city as special employer. The owner of the shovel did not procure insurance on the men employed by her in accordance with her contract. However, she is financially responsible, has admitted her liability, and therefore it is not under review herein.

The question presented is: Was the municipality, acting as cosponsor of a Works Progress Administration project, liable under the Workmen's Compensation Act for injuries to an employee of a contractor doing work on such project under a contract with the federal government?

The award against the city as special employer was made, it appears, because the city, through its engineers, exercised a certain amount of supervision over the work on the project, including the shovel in order to see that the work conformed to specifications, and for the further reason that the project was for the immediate benefit of the city.

The city contends that there was no contract of employment, either express or implied, between the injured and the city; that the work was being performed by and for the federal government under its relief program and not for the benefit of the city; and that none of the elements necessary to charge it as a special employer were present.

The record discloses these additional facts: The work on the project was divided into 22 "spots" or locations. The particular location upon which the shovel was used herein was known as project No. 524. The injured employee was a minor, who was not at the time of the accident, and never had been, a relief worker. At the time of the accident there were approximately 950 men employed on the project. These men were relief workers, paid by the federal government, except a very small percentage. Of this latter number the city had on the project a superintendent, Mr. Allen, and about 22 foremen. Mr. Ketring, one of these foremen, was in charge of the excavation work of the shovel at the time of the injury to the oiler. The federal government had on the location a project superintendent, Mr. Clow, who, it is shown by the evidence, was highest in authority among the men on the project, both city and federal, and who alone had the power to discharge or remove an employee found to be undesirable, from the work. Mr. Clow authorized the hiring of the injured person herein, after the work had started and it was ascertained that an oiler was needed in the operation of the shovel. The federal government supplied, among other employees, the timekeepers, first-aid men, and warehousemen. The timekeeping on the work, including that of the shovel crew, was done by federal employees. The employees of the city directed the excavation work by placing stakes in the ground and otherwise indicating where the shovel was to be used. Mr. Allen, the city's superintendent, when asked about his authority over the work, testified:

"Q. If you gave an order on a particular job to do it a certain way, and Mr. Clow would give an order a different way, whose order would govern, do you know? A. Mr. Clow's.

"Q. Whose orders in regard to how the work was to be done, where the work was to be done, whose orders would govern—yours? A. No; I never felt at any time that my word was the last word on the job. As a matter of fact I know it was not. If there was ever a question came up and it was anything of moment, the WPA engineer was superior to me. * * * I was subservient to them (the government) at least I always felt I was, and I know I was; I mean that was well fixed; that was definite."

Mr. Ketring testified that he had no jurisdiction over the men working on the shovel; that he was only interested as to where the dirt was moved to establish the width of the road according to their specifications. It was further shown that Mrs. Robare received her pay for the use of the shovel direct from the federal government, and that she in turn paid for repairs and gasoline for the shovel, and for the salaries of the two men employed thereon.

No case has been cited by petitioner from this jurisdiction, where under a similar state of facts the injured workman was not a relief worker. However, petitioner cites the cases of County of San Bernardino v. Industrial Accident Comm., 1 Cal.App.(2d) 598, 37 P.(2d) 122, and Board of Education v. Industrial Accident Comm., 3 Cal.App.(2d) 411, 39 P.(2d) 521, as being in point. While in those cases the injured was in the category of a "relief worker" doing work upon a relief project, and there, as here, it was sought to hold the public entities upon which the work was being done for compensation to the injured, the decisions therein rendered annulling the awards were not predicated entirely upon the fact that the injured were "relief workers." In those cases the court pointed out that the essential characteristics of a contract of hire entered into between the injured and the entities benefited were not present.

It has been judicially determined in other jurisdictions that work being done by federal relief agencies is not for the benefit of the local community and that the political entity thereby benefited is not the employer within the meaning of the Workmen's Compensation Insurance Act (St.1917, p. 831, as amended). In Hoover v. Independent School Dist., 220 Iowa 1364, 264 N.W. 611, 612, a case very similar in its facts to the one before us, it was said: "The claimants in this case were not on relief, nor had they ever been on relief. They were all painters. After the Civil Works Administration was organized, they applied for and received employment from the Civil Works Administration for Page County. * * * They were directed by the Civil Works Administration as to when and where to work. We think there is no question but what they were employees. The problem is to identify the employer. The theory of the claimants is that while the federal government was the general employer of these men, the school district was their special employer. * * * The circumstances in this case are such that it cannot possibly be said that there was any contract of service, express or implied, between these workers and the school district. The workers were employed, told when and where to work, and paid for their services, by the Civil Works Administration. The contract of service which these workers had was entirely with the Civil Works Administration. * * * Without reference to the details, it is sufficient to say that the particular project on which these men were working was carried on as a Civil Works project, as distinguished from a school district project. That is, the work was being done by the Civil Works Administration. Whatever aid to the project was furnished by the school district was furnished by way of contribution to the Civil Works Administration. The purpose of the Civil Works Administration was to create employment. It was set up under the provisions of the National Industrial Recovery Act, 48 Stat. 195, for that purpose. It undertook these projects with the consent of the public body affected by the project as a means of furnishing employment. The fact that the property of the school district was benefited, and the further fact that representatives of the school district were present when the work was being done to see that the completed job conformed to its plan for the improvement, are not controlling. The purpose of the Civil Works Administration was being accomplished by carrying out these projects with workmen employed by it. The workmen, therefore, were actually working for the Civil Works Administration when their injuries were received, and the rule of the loaned employee, even if recognized by us, would not apply." See, also, Todaro v. City of Shreveport (La.App.) 170 So. 356, 360.

[1] The facts here existing do not support the finding of the commission that the city was a special employer. Here the city did not employ the men on the project. It supervised the work to a certain degree, using such men as were assigned thereto by the Works Progress Administration, the latter paying their wages. As regards the shovel crew, the project funds were paid direct to the owner of the shovel and by her to the crew. The owner of the shovel was an independent contractor, whose contract was with the government under its relief program, and not with the city. In the absence of a contract of employment between the city and the owner of the shovel or crew these men cannot be held to be the employees of the city regardless of the right of the city to exercise some control over them. This result is not altered by the fact that the federal government expressly contracted that the shovel crew were not its employees.

[2] Courts have judicially noticed the fact that the primary objective of the Federal Emergency Relief Appropriation Act of 1935 (15 U.S.C.A. § 728 note) was not to benefit particular municipalities or localities, but to provide relief for unemployment. By contributing a small part of the necessary expense and by contributing the services of a superintendent and a small number of employees the City of Los Angeles was able to obtain the benefit of this project. It was not, however, city work of which the city had control, but was under the rules and regulations of the

Emergency Relief Administration. Hoover v. Ind. School Dist., supra; Shelton v. City of Greeneville, 169 Tenn. 366, 87 S. W.(2d) 1016; Todaro v. City of Shreveport, supra.

In view of the conclusion here arrived at, that no contract, express or implied, existed between the injured workman and the city and that the latter therefore was not a special employer, the question of whether or not a claim against the city was properly filed by the applicant need not be considered.

The award against the City of Los Angeles is annulled.

9 Cal.2d 691

EVERTS v. SUNSET FARMS, Inc., et al.

L. A. 16276.

Supreme Court of California.

Oct. 11, 1937.

1. Corporations 🔑1

In creditor's suit to have assets of S. corporation applied to indebtedness of F. corporation and of F., an individual, evidence sustained finding that F. corporation was the alter ego of F., and the S. corporation was the alter ego of F. corporation and of F.

2. Fraudulent conveyances 🔑299(9)

Evidence sustained finding that transfers made by debtors were not followed by immediate and continued change of possession, that transfers were made to delay and to defraud creditors and were made when debtors were insolvent and in contemplation of insolvency (Civ.Code, §§ 3439, 3440, 3442).

3. Fraudulent conveyances 🔑300(1)

Evidence sustained finding that debtor's transfer of stock to his son-in-law was without consideration.

4. Fraudulent conveyances 🔑300(1)

Evidence sustained finding that debtor's transfer of properties of value of $170,000 to debtor's attorney for consideration of services rendered and to be rendered was without any consideration, where attorney had already been paid large sums.

5. Fraudulent conveyances 🔑225

That judgment creditor levied on, and at execution sale purchased, preferred stock of corporation owned by judgment debtor, did not estop creditor from seeking to have judgment debtor's conveyances to the corporation set aside as fraudulent where, at time of his purchase, creditor did not know that the corporation was but alter ego of the debtor.

6. Fraudulent conveyances 🔑225

Transfers made in fraud of creditors were void and not merely voidable, and as to such transfers there could not be a legal ratification and they could not give rise to an estoppel (Civ.Code, §§ 3439, 3442; Pen. Code, § 531).

7. Trial 🔑139(1)

Defendants' motion for a nonsuit was properly denied where plaintiff had made a prima facie case.

8. Continuance 🔑10

Denial of motion to continue action in nature of creditor's bill by assignee of payee of note until determination of makers' actions against the payee for fraud and deceit was not error where it was not shown that any issues in common existed between creditor's bill and the makers' actions for fraud and deceit and there was no reason shown why maker's actions could not be fully tried and determined without reference to trial in the creditor's bill.

9. Continuance 🔑16

Where plaintiff took deposition of defendants' attorney but attorney did not sign it, and where defendants sought a continuance to enable them to have deposition signed and to offer it in evidence, denial of continuance was not error where defendants did not show that deposition contained testimony material to issue in case.

10. Continuance 🔑22

Where, for purpose of showing fraudulent intent of debtors in making certain transfers, plaintiff introduced evidence of other transfers made by debtors of other assets to other persons, denying debtors' request for continuance sought for purpose of enabling them to gather and present evidence meeting plaintiff's evidence regarding other transfers was not error.

11. Fraudulent conveyances 🔑286(5)

Where plaintiff raised issue as to whether debtors' transfers of certain assets was fraudulent, plaintiff was entitled to introduce in evidence other transfers made by debtors of other assets to other persons.

12. Appeal and error ⚷761

Where appellants' points were stated but no part of record was quoted, no authorities cited, and no argument set forth in support of points, court of review would not search record for purpose of finding something on which to base order of reversal.

◆

In Bank.

Appeal from Superior Court, Imperial County; G. R. Freeman, Judge.

Suit by H. W. Everts against Sunset Farms, Inc., and others. From an adverse judgment, defendants appeal.

Affirmed.

Jud R. Rush, of Los Angeles, and Don C. Bitler, of El Centro, for appellants.

Louis Ferrari, of San Francisco, A. S. Goldflam, of Los Angeles, E. S. Layman and Eustace Cullinan, both of San Francisco, Ross T. Hickcox and Hickcox & Provence, all of El Centro, and Cullinan, Hickey & Sweigert and Cushing & Cushing, all of San Francisco, Clarke & Bowker, of Los Angeles, for respondent.

STURTEVANT, Justice pro tem.

In an action in the nature of a creditor's bill the trial court caused a judgment to be entered in favor of the plaintiff as assignee of the Bank of America. The defendants appealed and have brought up typewritten transcripts. After all briefs had been filed, the plaintiff served and filed a notice of motion to dismiss or affirm. His motion was duly presented, and it was submitted together with the appeal on its merits. The motion so made was prepared with much care and skill, and it should have been granted because the record on appeal was, by the defendants, made in violation of the provisions of certain statutes and of several rules of this court of long standing governing the preparation of records on appeal. But, in view of the conclusion we have reached as to the appeal on its merits, we will not have occasion to consider the motion.

The complaint was very full and complete. The answers put in issue nearly all the allegations contained in the complaint and set forth several separate and additional defenses. The trial court with meticulous care found on each and all of the issues. All of the allegations contained in the complaint were found in favor of the plaintiff. The points made by the defendants include many attacks on those findings, claiming they are not sustained by the evidence. Before taking up each one of the points made by the defendants, we will state a general outline of the controversy. Some years prior to the commencement of this action, Will S. Fawcett, hereinafter referred to as Fawcett, commenced farming operations in the Imperial Valley. Later he caused a corporation, the Will S. Fawcett Company, hereinafter referred to as the Fawcett Company, to be formed and transferred to it many of his assets, and thereafter he did business through said corporation. He was the president thereof. The Fawcett Company was a stock corporation, and nearly all of the stock was held and controlled by Fawcett. Affairs so progressed that on December 31, 1930, Fawcett held assets which he valued at $972,522.68. The Fawcett Company held assets which Fawcett valued at $691,887.45. The said assets of Fawcett included his holdings in the Fawcett Company. Fawcett and the Fawcett Company each held a large block of stock in the Transamerica Corporation. At the same time Fawcett owed the Bank of America, the assignor of this plaintiff, on several notes $250,000, and the Fawcett Company owed sums aggregating over $690,000. Later matters so fell out that Fawcett and the Fawcett Company became aggrieved of and concerning certain financial transactions had with the Bank of America over and concerning the purchase by the former of shares of stock in the Transamerica Corporation and formed the opinion that they had a cause or causes of action against the Bank of America. At about the same time the Bank of America was demanding that the notes it held should be taken up. When affairs so stood, Fawcett and the Fawcett Company caused to be formed Sunset Farms, Inc., and conveyed to the latter some of their assets, and conveyed or assigned to others nearly all of the rest of their assets. The Bank of America assigned to plaintiff its notes. He sued thereon in actions 15387 and 15388 and recovered judgment against the makers. He then took out writs of execution, caused them to be levied on the assets of Fawcett and the Fawcett Company. Having applied the proceeds obtained from such levies, the plaintiff took out alias writs of execution, caused them to be levied, and they were returned indorsed nulla bona. There was then owing by the Fawcett Company $135,116.23 and by Fawcett $266,527.87. The plaintiff then commenced this action against the Sunset Farms, Inc., Will S. Fawcett, Warren Currier, and Don C. Bitler. Said individuals constitute the board of directors of said corporation.

In what follows we have not attempted to set forth all of the evidence in a transcript containing 1,500 typewritten pages. But, in support of the judgment, we have set forth some of the salient facts contained in the record, and we may add there are other facts reinforcing the facts we have set forth.

[1] 1. The trial court made findings that the Fawcett Company was the alter ego of Fawcett, and that the Sunset Farms, Inc., was the alter ego of the Fawcett Company and of Fawcett. The defendants claim those findings are not supported by the evidence. They quote no evidence, cite no authority, and make no argument in support of the point. An examination of the record discloses there was ample evidence to support said findings, and, if the findings had been otherwise, they would have been against the clear weight of the evidence.

[2] 2. The plaintiff alleged, and the trial court found, that the transfers made by the defendants were not followed by an immediate and continued change of possession, were made to delay and to defraud their creditors, and were made when the defendants were insolvent and in contemplation of insolvency. He pleaded, not a part of, but all of, the provisions of sections 3439, 3442, and the first paragraph of section 3440 of the Civil Code. Conservatively he claims his complaint pleaded four different causes of action. We think it pleaded more. He proved each element of each of the several causes of action so alleged. The defendants contend that he did not prove some of those causes of action. That claim is not well founded. On the evidence quoted by the defendants, their claim has some support. But they do not set forth the evidence which is against them.

3. The plaintiff alleged, and the trial court found, that the conveyances and transfers to the defendants were made to delay and to defraud the creditors of Fawcett and the Fawcett Company, and the defendants attack those findings as not being supported by the evidence. We find no merit in the attack. The plaintiff alleged that the transfers were made with intent to delay the creditors of the transferors. Civ.Code, § 3439. When Fawcett was examined as a witness, he, in effect, testified that such was the fact. Furthermore, there were numerous facts developed which clearly showed such to be the truth.

4. That the transfers were made to defraud the creditors of the defendants is shown by the record. The defendants do not set up all of the evidence, and they cannot expect this court to do so. We think it is sufficient to state that a most complete camouflage was set up. That was done by creating the Sunset Farms, Inc. It was so created, organized, and operated that no one who did not hold common stock could see inside. Inside, all was under cover. Even its cash was not banked, but certificates of deposit were bought and held for surrender at such times and for such purposes as the owner saw fit. Holdings were misnamed. Holdings in the Transamerica Corporation (itself solely a holding corporation) were entered on the records of Sunset Farms, Inc., as "Street stock." The facts recited in this paragraph, read in connection with the other facts recited by us in this opinion, clearly show the transfers were made with the intent to defraud the creditors of the transferors, and, in particular, to defraud this plaintiff and his assignor.

5. The plaintiff alleged, and the trial court found, that the transfers to the defendants were not accompanied by an immediate delivery and followed by an actual and continued change of possession. As to a large part of the personal property, the evidence clearly showed no change of possession whatsoever. The defendants do not specially call our attention to any exceptions.

[3, 4] 6. Again the plaintiff alleged and the trial court found that at the time the transfers were made the transferors were insolvent and in contemplation of insolvency and that the transfers were made voluntarily and without a valuable consideration. The defendants attack the entire finding. We find no merit in the attack. It is an admitted and uncontroverted fact that the transfers were made voluntarily. It is an admitted and uncontroverted fact that the transfers of farm equipment to the Sunset Farms, Inc., were in exchange for shares of stock in that corporation. Therefore Fawcett merely transferred his money from

one pocket to another. The Fawcett Company leased its lands to the Sunset Farms, Inc. The leases contained such covenants that qualified witnesses, familiar with the agricultural industry in the neighborhood where the lands were located, testified that to the lessor said leases were of no value. Moreover, each lease was, in legal effect, a lease from Fawcett to himself. A block of 44,435 shares of stock of Rainbow Oil Company valued by Fawcett at $190,240, was transferred to him by the Fawcett Company for $15,000 and the release of his claim for $131,000 against the Fawcett Company. He then sold the stock to his son-in-law at $1 per share and took the note of the latter. The note, Fawcett testified, was paid, but he could not state what he did with the money. He said he did not bank it. Transfers to the attorney for the transferors were made of properties of the value of $170,000 for a consideration of services rendered and to be rendered. The attorney had already been paid large sums. The trial court had the power to place a value on such services. On the evidence introduced the trial court was justified in finding that the two transfers just mentioned were made without any consideration.

7. That, after the transfers had been made, both Fawcett and the Fawcett Company were insolvent is evidenced by letters written to the Bank of America and by the fact that the sheriff returned to the plaintiff his writs of execution with a return indorsed thereon "nulla bona." That such return squared with other facts is evidenced by the admission of the defendants that all of their remaining assets consisted of claims for damages against the Bank of America et al., which we have mentioned and will later consider in greater detail. In conclusion on this point it is sufficient to state that on the record before it the trial court had the power to determine said claims were a myth and of negligible value, if they had any value whatever. Finally, as we have shown above, the findings based on other allegations support the judgment even though the findings on insolvency were wholly unsupported.

[5, 6] 8. In attempting to collect the judgments rendered in his favor in the actions based on the promissory notes assigned to him, the plaintiff levied on 5,884 shares of the preferred stock of Sunset Farms, Inc., held by the Fawcett Company. Later a sale was had and the plaintiff purchased and became the owner. In their answers the defendants set up such fact, and claimed, and now claim, that the plaintiff confirmed and ratified the acts of the defendants and is estopped to set forth and enforce the facts pleaded in the instant action. As to the nature of said stock the plaintiff had no knowledge at the time of his purchase. Later he learned that the Sunset Farms was incorporated under the laws of the state of Nevada; that under the laws of said state and the terms of the certificates said stock had no voting power; that the dividends on the preferred shares were not cumulative; that such shareholders had no right to inspect the books of the corporation; that the entire control of the 2,100 shares of common stock was held by Fawcett or his agents and for which only $2,100 had been paid. However, he later learned each of said facts to be the truth and that Sunset Farms, Inc., was but the alter ego of Fawcett and the Fawcett Company. During the trial he tendered back the stock and deposited it with the clerk of the trial court for the account of the former owner. Furthermore, as we have already shown above, the transfers were in fraud of creditors. They were void and not merely voidable. Scholle v. Finnell, 166 Cal. 546, 137 P. 241. They were in contravention of the statute and public policy (Civ.Code, §§ 3439 and 3442; Pen.Code, § 531), and, as to such transfers, there cannot be a legal ratification and such facts do not give rise to an estoppel. Reno v. American Ice Machine Co., 72 Cal.App. 409, 237 P. 784.

[7] 9. After the plaintiff had introduced evidence sustaining the allegations contained in his complaint he rested. The defendants made motions for a nonsuit. Asked if they cared to argue the motions, they stated they did not. The trial court denied the motions. At this time the defendants assign those rulings as error. As will appear from what has been said above, in our opinion the plaintiff had made a prima facie case. The court did not err in denying the motions.

[8] 10. The defendant Fawcett had commenced two actions against the Bank of America et al., and the Fawcett Company had commenced two other actions against the same defendants. All of said actions had been brought and, at the time of the trial in the instant case, they were pending in the superior court in and for the county of Los Angeles. Each action

named many defendants. In each action the plaintiff sought actual damages and punitive damages. At different times during the trial the defendants asked that the trial be continued until said actions in Los Angeles had been determined. The motions were denied. The record shows that action 357726 purported to be a claim for damages for fraud and deceit perpetrated by many defendants inducing Fawcett Company to refrain from selling Transamerica stock. Action 357725 was the same except it alleged Fawcett was so induced. Action 359699 was based on a claim that Transamerica stock was fraudulently transferred to Fawcett Company. Action 359700 was the same except the alleged fraud was practiced on Fawcett. Before the trial of this case two of said actions had been dismissed. Code Civ. Proc. § 581a, as amended by St.1933, p. 1869. Which actions had been dismissed this record does not show. Nor does it show a single issue in common between this action and the two actions that had not been dismissed. No cause is shown why said last-mentioned actions cannot be fully tried and determined without reference to the trial in the instant case. The defendants claim error was committed. They cite and rely on Robinson v. El Centro Grain Co., 133 Cal.App. 567, 573, 24 P.(2d) 554; Eckert v. Graham, 131 Cal. App. 718, 721, 22 P.(2d) 44; 5 Cal.Jur. 985. Those authorities are not in point. They deal with actions having at least some issues in common. Fawcett and Fawcett Company can proceed with the trial of the Los Angeles cases, recover any judgments to which they are entitled, and enforce them. The trial and determination of the instant case did not in any manner prejudice any rights which the defendants have in said Los Angeles actions. The trial court did not err in denying the motions for a continuance.

[9] 11. The plaintiff took the deposition of the attorney for the defendants, but he did not sign it. The defendants called these facts to the attention of the trial court and asked a continuance until the deposition could be signed and then offered in evidence by the defendants. Their request for a continuance was denied, and they assert that ruling was error. We think it was not. They showed no facts to the trial court and have shown no facts to this court from which it can be ascertained said deposition contained a word that was material in the trial of this case. It is patent the trial court did not commit error in refusing a continuance.

[10, 11] 12. During the course of the trial, for the purpose of showing the fraudulent intent of the defendants in making transfers to Sunset Farms, Inc., the plaintiff introduced evidence of other transfers made by defendants of its other assets to other persons. Claiming such evidence was on issues not presented by the pleadings, the defendants asked a continuance for the purpose of enabling them to gather and present evidence meeting the evidence above mentioned. That motion was also denied, and the ruling is assigned as error. But we see no error in the ruling. The plaintiff was clearly entitled to prove any fact showing, or tending to show, the fraudulent intent of the defendants in making the transfers which were under attack, and the plaintiff's complaint clearly advised them of his contentions. The defendants should have gone to trial duly prepared to meet the issue so tendered.

[12] 13. The defendants' points 8, 9, 10, and 11 are stated, but no part of the record is quoted, no authorities are cited, and no argument is set forth in support of any one of said points. Under such circumstances a court of review will not search a record for the purpose of finding something on which to base an order of reversal.

14. The defendants state that the trial court erred in denying certain offers of proof. They quote the record showing the offers. Every one was an offer of opinion evidence on matters not capable of proof by such evidence. We have read each offer. We find no errors in the refusal of each and all of them.

15. As stated above, we find no error in defendants' assignments numbered 10, 11, 12, and 14. Conceding, solely for the purposes of this decision, that we are mistaken as to any one of said assignments, still the judgment may not be reversed because the defendants have not shown any one of said rulings so attacked by them was prejudicial in any respect, or that anything has been done or omitted that purports to show a miscarriage of justice.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; NOURSE, Justice pro tem.

9 Cal.2d 640

ARONSON et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

L. A. 16307.

Supreme Court of California.

Oct. 4, 1937.

Rehearing Denied Nov. 1, 1937.

1. Trover and conversion 🔑4

"Conversion" is the unwarranted interference by defendant with the property of plaintiff, and implies some act of ownership or exercise of dominion over property of another in defiance of his rights.

[Ed. Note.—For other definitions of "Conversion," see Words & Phrases.]

2. Evidence 🔑60, 83(1)
Executors and administrators 🔑443(1)

In action by heirs against administrators for wrongful transfers of shares of stock, allegation that it was intention and purpose of administrators in changing certificates to use and dispose of stock represented thereby for administrators' own individual benefit and profit was insufficient to establish conversion, because of failure to allege consummation of unlawful purpose, since court was bound to presume that administrators were still acting as administrators and that they were innocent of crime or wrong (Code Civ.Proc. § 1963).

3. Corporations 🔑130

A corporation, not being bound to inquire as to authority of executor or administrator to transfer stock standing in name of decedent, except in so far as such authority is limited by restrictions in will or general law, cannot require proof of such authority before making transfer on its books on indorsement of executor or administrator, and mere fact that executor is acting at his own risk in transferring stock to legatee does not justify such refusal in absence of showing of other facts making transfer improper.

4. Corporations 🔑133, 134

A corporation is liable in conversion when it wrongfully transfers or refuses to transfer stock on its books.

5. Banks and banking 🔑40

In action by heirs against successor bank for transfers on books by original banks, to the rights and liabilities of which successor bank has succeeded, of bank stock belonging to estate, allegations that transfers were procured by administrators without confirmation of probate court were insufficient to show conversion by banks, since statute authorizes corporation to make transfer on presentation of certificates by legal representative of owner (Civ.Code § 324, as amended by St.1907, p. 854).

6. Statutes 🔑174

Where statute measures power or prescribes mode of conduct, individual cannot be charged with wrong if he does nothing more than follow terms of statute.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Herbert Hellman Aronson and a minor coplaintiff, by Daniel Aronson, the guardian of their estates, and by the named plaintiff individually, against the Bank of America National Trust & Savings Association. From a judgment of dismissal and an order denying permission to amend their complaint after the sustaining of a general demurrer, plaintiffs appeal.

Judgment affirmed.

Prior opinion, 65 P.(2d) 823.

Mitchell, Silberberg, Roth & Knupp and Livingston & Livingston, all of Los Angeles, for appellants.

Freston & Files, Edmund Nelson, G. L. Berrey, and James A. McLaughlin, all of Los Angeles, Louis Ferrari, of San Francisco, and Ralph E. Lewis and O'Melveny, Tuller & Myers, all of Los Angeles (Louis W. Myers, of Los Angeles, Louis Ferrari, of San Francisco, and Ralph E. Lewis and Sydney Wetzler, both of Los Angeles, of counsel), for respondent.

NOURSE, Justice pro tem.

This appeal is taken from a judgment of dismissal entered after a general demurrer to plaintiffs' complaint was sustained without leave to amend. Before entry of the judgment, plaintiffs were allowed, by stipulation, to tender an amended complaint, leave to file which was denied after a full hearing. A bill of exceptions was settled and filed wherein the sole specification of error is the denial of leave to amend. Inasmuch as the proposed amended complaint fails to cure the matters hereinafter noted, we will confine our review to the question whether the complaint states a cause of action.

The action was commenced in July, 1935, against respondent bank and Marco and

Irving Hellman to recover damages for the alleged conversion of certain shares of stock of the Hellman Commercial Trust & Savings Bank and of the Merchants National Trust & Savings Bank. It does not appear that either of the Hellmans was served with process. The defendant bank was sued as the successor to the business of the two banks named.

In 1920 plaintiffs' mother, Amy Hellman Aronson, died intestate, leaving as her sole heirs the plaintiffs, who were minors. The two Hellmans were appointed as administrators and still continue to act as such, and the administration of the estate is still pending. In October, 1925, after settlement of their account as such, the entire estate was distributed to these plaintiffs, the decree expressly including all property of every kind and nature belonging to the estate, whether described in the decree or not. All the stock in question was inventoried as an asset of the estate, but it is alleged that no accounting of the transfers complained of was made to the probate court. Complaint is made of four separate wrongful transfers, two made prior to the date of distribution, and two made thereafter. The old certificates standing either in the name of the deceased or in the name of the estate were for shares of stock in the banking corporations named, of which both administrators were either directors or officers or both. The old certificates were canceled and new certificates issued without order of court or other authority, some on the indorsement of both administrators, others on indorsement of one administrator only. Though the complaint alleges that it was the intention and purpose of the Hellmans, in changing the certificates, "to use and dispose of the shares represented thereby for their individual benefit and profit," it does not allege that they did so use the shares nor that they have ever disposed of any of them.

[1, 2] This is the outstanding weakness of the complaint. Conversion implies "some act of ownership or exercise of dominion over the property of another in defiance of his rights." 24 Cal.Jur. p. 1022, It is "the unwarranted interference by defendant with the dominion over the property of the plaintiff." Byer v. Canadian Bank of Commerce (Cal.Sup.) 65 P.(2d) 67, 68. The allegations of an unlawful purpose in the minds of the Hellmans (but with no allegation of a consummation of such or any other purpose) fall far short of an allegation that those defendants interfered in any manner with the "dominion" of the plaintiffs. In the absence of allegations to the contrary we must presume that they are still acting as administrators of the estate. As such, they were entitled to exercise "dominion" over all the personal property of the estate. In that capacity their possession was not an interference with the "dominion" of the heirs; they held for the heirs and not adversely to them./ We must further presume that their acts were "fair and regular," and that they were "innocent of crime or wrong." Code Civ.Proc. § 1963. If these presumptions do not apply, it is incumbent upon the pleader to rebut them by clear and positive allegations. But the complaint does not plead any facts upon which even an inference of fraud, wrong, or unfair dealing may be founded. The only reasonable inference that could be drawn from the facts pleaded is that, for some reason not disclosed in the pleadings, the names on the certificates were changed, but that the Hellmans still hold the shares as administrators for the use and benefit of the plaintiffs. Therefore, assuming that the original banks were guilty of a conversion when they transferred the shares, there are no facts pleaded showing that the plaintiffs suffered any injury in the transactions. As stockholders in the selling banks, they would be entitled to their proportionate part of the sales to the respondent. But they do not allege whether they received these proceeds, or whether they are held in the estate for them awaiting distribution, or held by the selling banks for the same purpose. The allegation that they received no "consideration" for these transfers and that the value of the "shares" has been lost does not meet this objection since the "consideration" might be still awaiting their demand. The complaint alleges that the respondent purchased the "banking business" of the Merchants National Trust & Savings Bank and succeeded to all "its property assets and business generally." But it is silent as to the disposition of the proceeds of the sale, and does not plead a demand on the selling bank nor that such bank is not able to respond. It is also silent as to any charges of actual fraud on the part of any of the banks. Thus, so far as appears from either complaint, the entire proceeds of the sales may still be held by the selling banks awaiting distribution to the stockholders according to their respective interests; and, since the possession of the administrators of the stock certificates is but evidence of the interest of plaintiffs in the shares of stock, it does not appear how they have lost the value of such shares.

[3, 4] But we are confronted with a more serious question and that is whether under the facts alleged any conversion is chargeable to the selling banks, liability for which would be assumed by this respondent. The alleged conversion took place when the original banks transferred the shares on their books upon presentation by the administrators of the original certificates—some standing in the name of the deceased, others in the name of the estate. The complaint alleges the due appointment and qualification of the two Hellmans as administrators, and that they were acting as such at the time of these transfers. The gravamen of this phase of the case is that the transfers were procured without an order of confirmation of the probate court and that those banks accordingly committed an act of conversion by effecting the transfers without such order. Section 324 of the Civil Code, as it read at the time these transfers were made, provided: "such shares of stock * * * may be transferred by indorsement by signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate." (St.1907, p. 854). It should be noted that the section does not require proof of the authority of the legal representative. It is at this point that the parties separate—the appellants arguing that, in the absence of such proof, a conversion results, the respondent arguing upon the strict terms of the statute which do not require it. The appellants rely upon Quay v. Presidio & F. R. R. Co., 82 Cal. 1, 22 P. 925, and Tafft v. Presidio & F. R. R. Co., 84 Cal. 131, 24 P. 436, 11 L.R.A. 125, 18 Am.St.Rep. 166. Both involved similar transactions. Stock was transferred on the books of the corporation following delivery of the original certificates by one holding the power of attorney of the owner. In both cases it was held that the power of attorney did not authorize the indorsement, and that the corporation had actual notice of that fact at the time of the indorsement. Here the complaint alleges that the issuing banks had full notice and knowledge that the Hellmans did not have authority to "transfer or dispose of said stock," but it does not allege that they had notice or knowledge that the Hellmans did not have authority as administrators to indorse the certificates and thus pave the way for a confirmation by the probate court. It seems to be their contention that such confirmation must be had before the transfer is made on the books of the corporation. But section 1523 of the Code of Civil Procedure, which controlled at the time of these transactions, authorized the executor or administrator to sell from time to time all or so much of the personal property as may be necessary, such sale "to take effect only upon confirmation by the court." In 11 California Jurisprudence, page 890, it is said: "All sales must be under oath reported to and confirmed by the court before title to the property passes, and it is specifically provided that sales of personal property take effect only upon confirmation by the court. If, therefore, the sale is not sanctioned by the court, the title remains in the estate." We find nothing in the statutes existing at the time which required proof of confirmation of the sale before a transfer could be made on the books of the corporation. Fletcher's Cyclopedia of Corporations, volume 12, page 443, states the rule as follows: "Since a corporation is not bound to inquire as to the authority of an executor or administrator to transfer stock standing in the name of his decedent, except in so far as such authority is limited by restrictions in the will or the general law, it cannot require proof of such authority before making a transfer on its books on his indorsement. Nor will the mere fact that an executor is acting at his own risk in transferring stock to a legatee justify such a refusal, in the absence of a showing of other facts making the transfer improper." 26 Ruling Case Law, page 1115, states that a corporation is liable in conversion when it "wrongfully" transfers or refuses to transfer stock on its books. The authorities there cited are in accord with the Quay and Tafft Cases where the corporation has actual knowledge of the "want of authority" of the agent demanding the transfer. These authorities are not out of harmony with anything said herein. They are in accord with the general principle that a conversion is "some act of ownership or exercise of dominion over the property of another in defiance of his rights." It is this essential element which is lacking here. The administrators were entitled to the possession and "dominion" of the property of the heirs. No act charged to the selling banks interfered with this possession or dominion. The cases cited would be analogous to this if the powers of attorney

therein had expressly authorized the agent to procure the transfers, and he had thereafter converted the stock in defiance of the rights of his principal. Here the statutes in probate above noted confer that right.

[5, 6] The question presented here is controlled by the statute. Section 324, Civil Code, authorizes a corporation to make the transfer upon presentation of the certificates by the "legal representative" of the owner. It is conceded that the Hellmans were the legal representatives of the owners of the stock and that the transfers were made upon their demand. It is a rule which requires no citation of cases that, when a statute measures the power or prescribes the mode of conduct, the individual cannot be charged with wrong if he does nothing more than follow the terms of the statute. This is all that the complaint alleges that the selling banks did in this transaction. There was therefore no conversion on the part of the selling banks under the facts here pleaded, and hence there was no liability cast upon the purchasing bank—the respondent herein.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; EDMONDS, J.; SEAWELL, J.

---

22 Cal.App.2d 332

GENERAL PETROLEUM CORPORATION OF CALIFORNIA v. CITY OF LOS ANGELES et al.

Civ. 11410.

Supreme Court of California.

Oct. 14, 1937.

Courts ⇨487(1)

In denying petition for hearing of case wherein a municipality was a defendant, the Supreme Court withheld approval of portion of opinion of District Court of Appeal holding that the defense of ultra vires is not available to a municipality unless pleaded.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman and Ruben S. Schmidt, Judges.

Suit by the General Petroleum Corporation of California against the City of Los Angeles and another. On appeal by plaintiff, a judgment for the named defendant was reversed [70 P.(2d) 998]. On petition for hearing.

Petition denied.

Martin J. Weil, W. L. Appleford, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., for respondent.

PER CURIAM.

The petition for hearing is denied. We withhold, however, our approval of the last paragraph of the opinion wherein it is held that the defense of ultra vires is not available to a municipal corporation unless it is pleaded.

---

9 Cal.2d 711

PEOPLE v. GOODWIN et al.

Cr. 4128.

Supreme Court of California.

Oct. 18, 1937.

1. Homicide ⇨253(1)

Evidence supported convictions of murder of the first degree (Pen.Code, § 189).

2. Robbery ⇨24(1)

Evidence supported convictions of robbery.

3. Assault and battery ⇨92

Evidence supported convictions of assault with a deadly weapon.

4. Homicide ⇨257(1)

Evidence supported convictions of assaults with a deadly weapon with intent to commit murder.

5. Criminal law ⇨438

In prosecution for murder, robbery, assault with a deadly weapon, and like assaults with intent to commit murder, photographs identified by autopsy surgeon as accurate representations of portion of deceased's body showing gunshot wound were admissible.

6. Criminal law ⚷829(1)

Refusing instructions as to issues fully covered by other instructions was not error.

7. Criminal law ⚷1130(2)

The refusal of an instruction was no ground for reversal where accused's brief, contrary to court rule, failed to set forth other and proper instructions on the subject (Rules of the Supreme Court, rule 8, § 3).

8. Criminal law ⚷723(1)

In prosecution for murder and other offenses, argument of district attorney that penalty for murder of the first degree was capital punishment, unless there were circumstances of mitigation, was not prejudicial to accused (Pen.Code, § 190).

9. Criminal law ⚷589(2)

In prosecution for murder, robbery, assault with a deadly weapon, and like assaults with intent to commit murder, refusal to grant accused continuance on trial of issue of his sanity was not erroneous.

10. Criminal law ⚷625

In prosecution for murder, robbery, assault with a deadly weapon, and like assaults with intent to commit murder, permitting trial of issue of accused's sanity by same jury which passed on general issue was not erroneous.

11. Jury ⚷127, 137(1)

In prosecution for murder, robbery, assault with a deadly weapon, and like assaults with intent to commit murder, refusing accused permission, before trial of issue of his sanity, to re-examine jurors for cause and to exercise additional peremptory challenges, was not erroneous.

◆

In Bank.

Appeal fom Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Lee Grant Goodwin and Patrick Egbert Goodwin were convicted of murder of the first degree, robbery, assault with a deadly weapon, and like assaults with intent to commit murder, and they appeal.

Affirmed.

William W. Larsen and William J. F. Brown, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and V. L. Ferguson, Deputy Dist. Atty., both of Los Angeles, for the People.

WASTE, Chief Justice.

The appellants, who are brothers, were found guilty on several counts of an amended information filed by the district attorney of Los Angeles county. Specifically, they stand convicted of murder of the first degree, robbery, assault with a deadly weapon, and two like assaults with intent to commit murder. The jury by its verdict impliedly having rejected Grant Goodwin's dual plea of not guilty and not guilty by reason of insanity and having returned a verdict on the murder charge without recommendation, judgment imposing the extreme penalty has been entered against him. In the case of Patrick Goodwin, whose plea went solely to the general issue, the jury recommended life imprisonment on the murder charge and he has been accordingly sentenced. Each appellant, in addition, has been sentenced as prescribed by law on the lesser offenses, some of said sentences running concurrently while others are to run consecutively.

The several offenses were the outgrowth of the robbery of a combination grocery store and market in the perpetration of which robbery, or while fleeing from the scene thereof, one of the offenders, admittedly Grant Goodwin, shot and killed the store manager, assaulted a customer, and fired several shots at a pursuing police car containing two officers. Some of the shots struck the pursuing car.

Pat Goodwin challenges the sufficiency of the evidence to sustain his conviction of the several designated offenses and urges, in effect, that while he admittedly was with his brother and codefendant on the night in question, he had gone with him without knowledge that his brother possessed a gun and had entered the store for the purpose of robbery. He contends that he remained in their automobile, the engine of which was concededly kept running, while his brother ostensibly departed to purchase some cigarettes. Grant Goodwin, who, as indicated, admitted the robbery and the firing of the fatal shot, as well as firing upon the pursuing officers, corroborates his brother's testimony as to the latter's innocence of and nonparticipation in the commission of the several offenses.

[1–4] However, there was ample evidence upon which the jury reasonably might, and did, conclude that Patrick Goodwin was a willing participant in the series of crimes of which he stands convicted. In this connection, and in contradiction of the appellants' evidence that Patrick Goodwin did not leave the automobile at the scene of the robbery, the prosecution produced a disinterested witness who testified that immediately prior to the robbery and homicide he had seen Patrick Goodwin just inside the door of the market looking around and later talking to his codefendant on the sidewalk.

This may well have been interpreted by the jury as a reconnoitering expedition followed by a conference as to the method of be employed in perpetrating the robbery. The attempt to impeach the testimony of said witness because of minor and immaterial discrepancies between his testimony upon the preliminary hearing and at the trial is deserving of no more than passing mention.

Immediately after the robbery and homicide, Grant Goodwin ran to the automobile which was then driven away at a high rate of speed by Patrick Goodwin. After a chase of approximately ten miles, in which shots were exchanged between the fleeing car and the pursuing police car, the former was finally overtaken. In it, and wounded, was Patrick Goodwin. His brother apparently had abandoned the car during the chase. This evidence of flight coupled with the other evidence in the record, undoubtedly weighed against Patrick Goodwin and warranted the jury in concluding that his was a knowing and guilty participation in the events already mentioned.

There can be no question as to the sufficiency of the evidence as to the appellant Grant Goodwin in the face of his admission that he was the moving force in the commission of the several crimes. His claim that the killing of the person robbed was the result of an accidental discharge of his gun lacks in substance and in legal significance. Section 189, Pen.Code; People v. West, 215 Cal. 87, 8 P.(2d) 463.

[5] We find no merit in the contention that it was error to permit the introduction into evidence of two photographs of the deceased. They were identified by the autopsy surgeon as being faithful and accurate representations of that portion of the body of the deceased showing the gunshot wound. The authorities clearly establish their admissibility. People v. Magsaysay, 210 Cal. 301, 291 P. 582; People v. Burkhart, 211 Cal. 726, 297 P. 11; People v. Gomez, 209 Cal. 296, 300, 286 P. 998.

From what already has been said as to the sufficiency of the evidence, it necessarily follows that, contrary to the appellants' contention here, it was not error for the trial court to refuse to instruct the jury, as requested, to find the appellants not guilty.

[6, 7] We likewise find no error in the refusal of the court below to give "defendants' instruction No. 13." In other instructions, the court had fully and correctly informed the jury as to the burden to be met by the prosecution before either or both of the defendants might be found guilty. Moreover, contrary to section 3 of rule VIII, appellants' brief fails to set forth the other and proper instructions upon the subject.

Similarly, we find no error in the refusal to give a requested instruction on circumstantial evidence. The subject was sufficiently and properly covered in the charge to the jury.

[8] It is next urged that with respect to the appellant Grant Goodwin the district attorney was guilty of prejudicial misconduct in that in his closing argument to the jury he indicated that "the penalty for murder of the first degree is capital punishment, unless there are circumstances of mitigation. * * *" The contention is made that under the provisions of section 190 of the Penal Code the penalty for murder of the first degree is either capital punishment or life imprisonment in the discretion of the jury, without regard to the presence or absence of extenuating circumstances. In a number of cases it has been held not to be erroneous for the trial court to instruct the jury, in substance, that the lighter sentence should be recommended only in the event mitigating circumstances were found to exist. People v. Rogers, 163 Cal. 476, 483, 484, 126 P. 143; People v. Wolfgang, 192 Cal. 754, 762, 221 P. 907; People v. Gosden, 6 Cal.(2d) 14, 56 P.(2d) 211. In the light of these authorities, comment or argument of the district attorney to the same effect may not be held to be prejudicially erroneous, as here urged.

[9–11] Without the citation of authority, and with little persuasiveness, the appellant Grant Goodwin also urges that the court below erred in refusing to grant him a continuance on the trial of the sanity issue, in overruling his objection to the trial of said issue by the same jury that passed on the general issue, and in refusing him permission before the trial of the sanity issue to re-examine the jurors for cause and to exercise additional peremptory challenges. The several contentions lack merit and extended discussion thereof is unnecessary.

The judgments and orders are, and each is, affirmed.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; NOURSE, J. pro tem.

---

22 Cal.App.2d 411

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. McLAUGHLIN et al.

Civ. 10370.

Supreme Court of California.

Oct. 21, 1937.

In Bank.

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Judge.

On petition for a hearing.

Prior opinion, 71 P.(2d) 291.

Wyckoff, Gardner & Parker of Watsonville, and Garth V. Lacey, of Salinas, for appellants.

Keyes & Erskine, of San Francisco, and Rosendale, Scott & Thomas, of Salinas, for respondent.

PER CURIAM.

The petition is denied. In denying the petition we are not to be understood as approving what is said in the opinion respecting the admissibility of the testimony of the jurors as to the reasons upon which they based their verdict.

---

23 Cal.App.2d 83

FREY v. GARIBALDI.

Civ. 5864.

District Court of Appeal, Third District, California.

Oct. 6, 1937.

1. Evidence 🔑21, 34

It is common knowledge that, preceding issuance of patent for mining claim, there must have been a location in accordance with mining laws and that little or no development work is done upon claim until notice of location has been posted and filed.

2. Evidence 🔑34

It is common knowledge that to justify issuance of patent for placer mining claim sufficient development work must be shown to establish mineral character of claim and satisfy public officers that lands are more valuable for minerals than for agricultural purposes.

3. Mines and minerals 🔑43

Where patent for placer mining claim is issued, title of patentee and his grantees relate back to date of posting and filing of notice of location.

4. Waters and water courses 🔑7

As respects right to appropriate water, where notice of location of placer mining claim is posted and filed, claim for time being is no longer part of unappropriated public domain of United States.

5. Waters and water courses 🔑33

Where plaintiff failed to establish time of excavation of tunnel from which issued waters claimed by her on ground of an alleged appropriation while lands were part of public domain, plaintiff whose land was below defendant's was not entitled to quiet title to water as against successor to parties who had obtained United States patent in 1872 for placer mining claim covering premises on which tunnel was situated.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Mary E. Frey against Henry J. Garibaldi. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Snyder & Snyder, of San Andreas, for appellant.

Henry S. Lyon and Robert E. Roberts, both of Placerville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Action by plaintiff to quiet title to 35 inches of water measured under a 4-inch pressure of water flowing in a certain stream called "Stony Gulch Creek." The plaintiff's title to the water rests upon an alleged appropriation thereof when the lands involved in this action were all a part of the public domain of the United

States. Plaintiff's predecessors diverted the waters of Stony Gulch creek some time in the late '50's or early '60's, and conveyed the same through a certain ditch known as and called "Bob Liddle Ditch." The plaintiff also asks for an injunction against the appellant from diverting by any means any of the waters flowing in said Stony Gulch creek.

The lands belonging to the plaintiff, and upon which the waters diverted through the ditch referred to are used, is situate a mile or so below the lands owned by the appellant. The water involved is a small quantity, consisting of about one miner's inch, and is water developed by the excavation of a tunnel on lands now owned and possessed by the appellant.

The court found that the waters just referred to came from a tunnel excavated on the lands of the defendant Garibaldi, and consists of a part of the natural flow of the stream of Stony Gulch creek, and has been a part of the natural flow of said stream since the placer mining operations therein some time in the '60's, and is part of the natural flow of the said stream, subject to appropriative right of the plaintiff and her predecessors.

At the conclusion of the plaintiff's testimony, the appellant made a motion for a nonsuit. This motion being denied, the appellant rested his case upon the testimony introduced by the plaintiff.

The testimony in this case all relates to the date of the appropriation of the waters of Stony Gulch creek, as diverted and carried to the lands of the plaintiff by means of the Bob Liddle ditch. There is no direct testimony that the lands of the appellant herein were a part and portion of the public domain at the time of the alleged diversion of the waters of Stony Gulch creek. We do not need to question the contention made by the respondent that the testimony is sufficient to raise the presumption that all of the lands mentioned in this action were at that date a part of the public domain of the United States; nor do we need to question the contention of the respondent that the predecessors in interest of the respondent appropriated at least 35 inches of the waters of the above-named stream, and at a time when the lands were all a part of the public domain. This, however, does not entitle the plaintiff to judgment. While the argument in this case has taken a wide range, there are certain vital facts determinative of this action, not touched by the testimony. Before discussing the failure of testimony to reach the vital point involved in this action, we will refer to the case of Cory v. Smith, 206 Cal. 508, 274 P. 969, where the court had under consideration an action very similar to the one here being considered. There, it was held that the appropriator must show that, at the time of the appropriation, the lands belonging to the defendant were part of the public domain; that the complaint should allege the fact, of which fact the complaint made no mention. It was also held that the testimony should establish such fact, and that the testimony failed to substantiate such a conclusion. It was also held that a lower appropriator could not, by adverse possession, obtain any title as against an upper riparian proprietor.

As we shall refer to it hereafter, we may also cite the case of Haight v. Costanich, 184 Cal. 426, 194 P. 26, to the effect that a subsequent patent from the United States government carries the title of the patentee, by relation, back to the date of the patentee's entry upon the land, and a placer mining claim, when patented, would carry the title, by relation, back to the date when the notice of location of the premises was posted and filed.

While the contention is made that there is no showing that the appellant possesses any riparian rights, this contention overlooks the allegations contained in the third paragraph of the plaintiff's complaint, and also the testimony and patents issued to the appellant's predecessors, which fixes the status of the appellant as a riparian proprietor and forecloses any argument against his legal status as such.

The vital defect in the respondent's case in this action as to certain ownership to the waters flowing from a tunnel excavated on the appellant's lands is the entire want of testimony establishing the time of the excavation of the tunnel from which the waters issue. No matter how ancient the appropriation of the waters of Stony Gulch creek may be, unless the waters issuing from the tunnel referred to were in usable existence at that time and had become a part of the natural flow of the creek referred to, it is difficult to perceive just how an appropriation could be made thereof. We have not been referred to a scintilla of testimony showing the date when the water flowing from the tunnel became a usable quantity, nor have we been able to find, in a search of the transcript, a scintilla of evidence tending to establish such fact.

[1-3] The record shows that in 1872 the predecessors of the appellant obtained a United States patent for a placer mining claim covering the premises here involved. It is common knowledge that, preceding the issuance of a patent for a mining claim, there must have been a location in accordance with the mining laws; and it is also common knowledge that little or no development work is ever done upon a mining claim until after the notice of location has been posted and filed. Otherwise, interlopers would always seek to establish prior rights. It is also common knowledge, and one of the requirements of the mining law of the United States, that sufficient development work must be shown to establish the mineral character of the claim involved, and satisfy the public officers that the lands for which application has been made for a placer mining patent are more valuable for the minerals therein contained than for agricultural purposes. And, as we have said, when the patent is issued, the title of the patentee and his grantees relate back to the date of the posting and filing of the notice of location. The proof of the development work of the mining claim is presented to the department of the United States having jurisdiction of the issuance of patents, and would appear to be readily ascertained by any one interested therein.

[4, 5] From what has been said, the natural inference would be that the tunnel from which the waters claimed by the respondent are issuing was excavated after the posting and filing of the notice of location of the mining claim upon which the tunnel is located. Upon the posting and the filing of the notice of location, the placer mining claim involved is for the time being no longer a part of the unappropriated public domain of the United States. We may also add that the proceedings, including the survey of the mining claim leading up to the issuance of a patent, necessarily cover a rather long period of time.

There being absolutely nothing in the complaint, and not a scintilla of testimony in the transcript supporting the finding of the trial court as to the waters of the tunnel being developed upon public lands of the United States, and thereafter incorporated into the waters of Stony Gulch creek, there is no escape from the conclusion that the appellant's motion for a nonsuit should have been granted.

The appellant sets forth a number of other grounds for reversal of the judgment, such as that there is no showing that beneficial use of the waters alleged to have been appropriated, only conclusions being stated and no facts testified to to support the conclusions, the testimony showing simply that the water is used, first, to supply water for bathtubs, secondly, for irrigating a garden, and, thirdly, for irrigating meadow lands, without any facts showing the number of acres of meadow lands irrigated, and the quantity of water necessary to irrigate the same. But, from what we have stated concerning the absolute lack of testimony showing when the developed waters came into usable being, it is unnecessary to consider the points made by the appellant for reversal, or to follow his lengthy and learned argument.

It is shown by the testimony that the appellant's use of the water issuing from the tunnel consists of arranging a tank so that the waters may flow therein, and thereafter be used, and which water was used, for watering stock, which, of course, was a right possessed by a riparian owner. No contention is made that the appellant has made an excessive use thereof.

By reason of the failure of the testimony to show the acquisition of any title to the waters flowing from the tunnel, as against a riparian proprietor, it follows that the motion of the appellant for a nonsuit should have been granted.

The judgment is reversed, with directions to the trial court to sustain the appellant's motion for a nonsuit.

We concur: PULLEN, P. J.; THOMPSON, J.

23 Cal.App.2d 138

ZIEGLER v. OHIO FARMERS INS. CO.

Civ. 10414.

District Court of Appeal, First District, Division 1, California.

Oct. 13, 1937.

1. Pleading ⚿121(2)

In action on fire policy, answer of insurer alleging lack of information or belief as to amount of loss suffered by plaintiff did not raise an issue of fact, and hence proof of cash value of property destroyed and extent of plaintiff's financial interest therein at time of destruction was not required to support judgment (Code Civ.Proc. § 437).

2. Appeal and error ⚿176

If action on fire policy had been tried by court and parties on understanding that truthfulness of proof of loss being admitted, no further evidence showing cash value of property destroyed or extent of plaintiff's interest therein at time of its destruction was necessary where amount of loss suffered by plaintiff was pleaded in complaint, failure of plaintiff to offer any evidence on such subjects would not preclude judgment for plaintiff.

3. Appeal and error ⚿197(1)

An insurer which failed to deny allegations in complaint, in action on fire policy, as to amount of loss suffered by plaintiff was precluded from raising question for first time on appeal, that failure to offer any testimony as to cash value of property destroyed or extent of plaintiff's financial interest therein precluded judgment for plaintiff.

4. Insurance ⚿594

An owner of premises being sold to lessee under an optional agreement to purchase was not precluded from recovering on fire policy for loss of laundry equipment located thereon through an inappropriate rider attached to policy by mistake which limited owner's interest in proceeds to insurance on building, where, prior to suing on policy, the insured had assigned to owner the proceeds of the fire policy.

5. Trial ⚿162, 163

A motion for nonsuit was properly denied, where defendant did not state any grounds in support of its motion, and the motion was not made until after defendant had opened its defense by producing and examining a witness in support of its case.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Dora Ziegler against the Ohio Farmers Insurance Company. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

Leslie C. Gillen, of San Francisco, for appellant.

Martin S. Walsh, of San Jose, for respondent.

KNIGHT, Justice.

The defendant, Ohio Farmers Insurance Company, a corporation, appeals from a judgment in the sum of $861.80 rendered by the court after trial without a jury, in favor of the plaintiff, Dora Ziegler, in an action to recover on a policy of fire insurance issued to John W. Barron, covering property operated by him as a laundry; the buildings being insured for $1,000 and the equipment for $600. At the times of the issuance of the policy in January, 1933, and the occurrence of the fire the following April, respondent was the owner of the laundry premises, subject to a lease thereof to Barron carrying an optional agreement to purchase, upon which Barron had made some small payments; and at the same times she was the owner, by assignment, also of a recorded chattel mortgage on the equipment; the assignment likewise being of record.

[1-3] Appellant makes no claim of any concealment, deception, misrepresentation, or other fraud having been practiced upon it by any of the parties at any time; moreover, it admits that all premiums had been paid, that the property insured was destroyed by fire, and that due and truthful proof of loss was made in conformity with the provisions of the policy. But as the main ground of appeal it contends that respondent failed to offer any testimony showing the cash value of the property destroyed or the extent of respondent's financial interest therein at the time of its destruction, and that therefore the judgment is unsupported.

The state of the pleadings did not require the making of such proof for the reason that the amount of loss suffered by plaintiff was pleaded by certain allegations in paragraph 6 of the second amended complaint, the sufficiency of which is not challenged, and the answer contains no denials whatever of those allegations. In paragraph 5 of the answer appellant alleged that it had no information or belief sufficient to enable it to answer said allegations, but there the pleader stopped; and nowhere in said paragraph 5 nor elsewhere in said answer did appellant deny on information or belief or otherwise any portion of said allegations. As declared by section 437 of the Code of Civil Procedure, if the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer "and place his denial on that ground." It is evident, therefore, that where, as here, a defendant merely states that he has no information or belief sufficient to enable him to answer, and there stops and makes no denial on that or any other ground, no issue of fact is raised. Furthermore, it would appear from the record that the cause was tried by the court and the respective parties upon the understanding that, the truthfulness of the proof of loss being admitted, no further evidence upon either of the points mentioned was necessary. In any event, the failure to deny said allegations in paragraph 6 of said complaint precludes appellant from raising the point for the first time on appeal.

[4] Nor can we sustain appellant's further contention that on account of a statement contained in an inappropriate rider attached to the policy through the error of appellant's agent, purporting to limit the mortgagee's interest in the proceeds of the policy to the insurance on the buildings, respondent may not recover any of the insurance due on the loss of the laundry equipment, for the reason that subsequent to the fire and prior to the commencement of this action Barron, the insured, made a complete assignment to respondent of all of his interest, not only in the policy itself, but to all the proceeds thereof. This undisputed fact was established by the testimony of Barron, who was produced and examined by appellant as its own witness. It follows, therefore, that even though respondent was precluded from recovering the insurance on the laundry equipment under the technical terms of the erroneous rider, she was nevertheless entitled to collect the same as assignee of the proceeds of the policy.

[5] Appellant's final point is that the trial court erred in refusing to grant its motion for a nonsuit. But no grounds whatever were stated by appellant in the trial court in support of its motion, and the same was not made until after it had opened its defense by producing and examining the witness Barron in support of its case. Upon those grounds alone the trial court was justified in denying the motion.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

23 Cal.App.2d 172

PEOPLE v. TILLOTSON.

Cr. 427.

District Court of Appeal, Fourth District, California.
Oct. 15, 1937.

Criminal law 🔑1130(4)

Where appellant made no appearance and no brief had been filed in his behalf, nor extension of time for filing requested or granted, the time within which to file his opening brief having expired, motion to affirm judgment in accordance with statute was granted (Pen.Code, § 1253).

◆

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Proceeding between the People of the State of California and Clyde Emery Tillotson, alias Dr. H. J. House. From the judgment, the latter appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The clerk's and the reporter's transcripts herein were filed in this court on September 8, 1937. The appellant has made no appearance and no brief has been filed in his behalf. No extension of time for filing a brief for appellant has been requested or granted. The cause was regularly calendared for October 14, 1937, at which time the Attorney General moved the court to affirm the judgment in accordance with the provisions of section 1253 of the Penal Code. Since the time within which appellant's opening brief should have been filed has expired and no appearance has been made in his behalf the motion is proper and must be granted.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

23 Cal.App.2d 265

Ex parte ROSENBERG.

Cr. 1579.

District Court of Appeal, Third District, California.

Oct. 22, 1937.

1. Criminal law 🔑576(9)
Indictment and information 🔑16

An order sustaining demurrer to indictment, defect or insufficiency of which could not be remedied by amendment, terminated proceedings against accused, and order for resubmission of case to same grand jury initiated entirely new proceeding, so as to preclude dismissal of subsequent indictment for failure to bring accused to trial within 60 days after return of original indictment (Pen.Code, § 1008; § 1382, as amended by St.1935, p. 1467; Const. art. 1, § 13).

2. Habeas corpus 🔑4

A writ of habeas corpus is available only when there is no plain, speedy, or adequate remedy by appeal, or other appropriate method provided by law.

3. Habeas corpus 🔑85(1)

The superior court having impliedly found, in denying motion to dismiss prosecution for failure to bring accused to trial within 60 days after return of original indictment, that good cause was shown for delay and that accused was not deprived of any constitutional right, the Court of Appeal must hold in habeas corpus proceeding that his detention under subsequent indictment, returned by same grand jury, to which court resubmitted case after sustaining demurrer to original indictment, is lawful and such writ unavailable, in absence of showing that such determination by superior court was erroneous (Pen.Code, § 1008; § 1382, as amended by St.1935, p. 1467; Const. art. 1, § 13).

◆

Proceeding by Joseph Rosenberg for a writ of habeas corpus to discharge him from custody under an indictment for violating the Corporate Securities Act.

Writ denied, and petitioner remanded.

Bertram H. Ross and William E. Ferriter, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., and Henry S. Lyon, Dist. Atty., and Robert E. Roberts, Deputy Dist. Atty., both of Placerville, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is a petition for a writ of habeas corpus to discharge petitioner, who is held by virtue of an indictment wherein he is charged with violation of the Corporate Securities Act (St.1917, p. 673, as amended).

On June 25, 1937, petitioner was indicted by the grand jury of the county of El Dorado. To this indictment petitioner interposed a demurrer, which was sustained on July 6, 1937, and the superior court ordered the case resubmitted to the same grand jury. On August 3, 1937, petitioner moved to dismiss the proceedings on the ground that the prosecution was guilty of unreasonable delay in submitting the cause to the grand jury. This motion was denied. On August 24, 1937, the matter was resubmitted to the grand jury and an indictment returned again charging petitioner with a violation of the Corporate Securities Act. On August 25, 1937, petitioner moved for a dismissal of the proceedings on the ground that the petitioner had not been brought to trial within 60 days of the return of the indictment of June 25, 1937, contrary to section 1382 of the Penal Code (as amended by St.1935, p. 1467). This motion was denied by the court on August 25, 1937, whereupon petitioner seeks his discharge by this writ of habeas corpus.

[1] It is the contention of petitioner herein that the order of the superior court sustaining the demurrer to the original indictment did not result in a termination of the proceedings under the provisions of

section 1382 of the Penal Code, which provides that the court must order the prosecution to be dismissed if a defendant, whose trial had not been postponed, is not brought to trial within 60 days after the filing of the indictment. With this position we cannot agree.

Section 1008 of the Penal Code provides, in part: "If the defect or insufficiency be one that cannot be remedied by amendment, the proceeding shall be dismissed, but the defendant shall not be discharged if the court shall direct * * * the submission of the case to the same or a new grand jury."

It is conceded by all the parties to this action that the defect or insufficiency of the original indictment was one that could not be remedied by amendment.

Our attention is called by the Attorney General to People v. Holmes, 13 Cal.App. 212, 109 P. 489, 491. This case is not particularly helpful, as the court held the showing of the district attorney was sufficient to justify the continuance; the court saying: "If it be conceded that the date of the filing of the original information is the one which should be considered in connection with this motion, the motion was nevertheless properly denied."

8 California Jurisprudence, page 204, referring to People v. Holmes, supra, says: "It is an open question in California whether the time of the trial is to be computed from the filing of the original or of a new information in case the original has been held defective."

It would, however, seem that the dismissal of the proceedings and the order of submission of the case to the same grand jury pursuant to the provisions of section 1008 of the Penal Code, initiates an entirely new proceeding, and the indictment should not be dismissed, particularly when the filing of the new indictment was in response to a demurrer interposed by petitioner. As some evidence also that the reindictment is a new proceeding, is the fact that a defendant in such a situation is called upon to file a new bond for his release and to enter new pleas thereto.

In People v. Giesea, 63 Cal. 345, a demurrer had been sustained to the indictment, but upon appeal the order was reversed and the trial court directed to overrule the demurrer. When the cause was set for trial, the defendant objected, claiming more than 60 days had expired after the filing of the remittitur, and that under the provisions of section 1382 of the Penal Code he was entitled to a discharge. The trial court agreed with this contention and discharged the defendant and dismissed the cause. Upon appeal, the Supreme Court held that the case did not fall within the provisions of that section saying: "That section has no application where the prisoner has demurred to the indictment, the demurrer sustained, the effect of which ruling had to be gotten rid of by an appeal."

The holding in the foregoing case, as well as in People v. Lundin, 120 Cal. 308, 52 P. 807, where a motion to dismiss was based upon the fact that more than 60 days had elapsed due to an appeal by the defendant, was affirmed and approved in Re Alpine, 203 Cal. 731, 265 P. 947, 949, 58 A.L.R. 1500. In that case petitioner claimed he was entitled to his discharge on habeas corpus by reason of the fact the case was set for retrial more than 60 days after the filing of the remittitur upon the reversal of the first judgment. The court, among other things, held that section 1382 of the Penal Code has no application to the time for retrial upon a reversal of a judgment of conviction, and, further, that the defendant was not entitled to be discharged upon habeas corpus; that not being the proper remedy.

As has often been pointed out, article 1, § 13, of our Constitution, guarantees to every person charged with crime the right to a speedy and public trial. In order to prescribe what shall constitute a reasonable time the Legislature enacted section 1382 of the Penal Code, which provides, in part, that a prosecution must be dismissed if the defendant is not brought to trial within 60 days after the indictment is filed, unless good cause is shown for the delay.

In the instant case it would appear that the filing of a demurrer to the indictment by petitioner, which was sustained, and the order of the court that the matter be resubmitted to the same grand jury, would constitute good cause, at least upon habeas corpus.

It is urged by the respondent that the remedy of habeas corpus is not the proper procedure to follow, claiming that the method provided by section 1382 of the Penal Code for enforcing the remedy is by motion to dismiss the prosecution, and if the trial court wrongfully refuses to dismiss, a writ of mandate will lie to compel its dismissal. This method seems to find support in Re Alpine, supra, and in Ex parte Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A.(N.S.) 882, Ann.Cas.1912D, 1267.

[2] A writ of habeas corpus is available to a petitioner only when there is no plain, speedy, or adequate remedy by appeal, or by other appropriate method provided by law.

It is pointed out in Re Alpine, supra, the proper remedy of an accused who has not been brought to trial within 60 days after the indictment is filed, is by a motion to dismiss, and if the trial court wrongfully refuses to dismiss the petition, a writ of mandate would lie to compel its dismissal.

In Ford v. Superior Court, 17 Cal.App. 1, 118 P. 96, the court there held that mandamus may be invoked to compel the dismissal of an indictment under such circumstances.

We need not go into various reasons for this holding, as they are all clearly set forth in Re Alpine, supra.

Petitioner cites and relies upon the cases of In re Begerow, 133 Cal. 349, 65 P. 828, 56 L.R.A. 513, 85 Am.St.Rep. 178, and In re Ford, supra. The case of In re Begerow, supra, seems to be distinguished in the case of In re Alpine, supra, by Mr. Justice Seawell, who, in speaking of the Begerow Case, there said: "The peculiar facts of that case may have been responsible for carrying a majority of the court beyond a point not necessary for it to have gone in order to justify the discharge of the petitioner. The court may well have placed its decision on the ground that the Constitution, art. 1, § 13, guaranteeing to every person charged with crime a speedy trial, had been violated by a failure to bring the case to trial within a reasonable time after the fourth mistrial. The opinion clearly recognized the right of petitioner to a discharge under the self-executing provision of the state Constitution above cited without resorting to section 1382, Penal Code."

[3] The superior court in denying the motion to dismiss the prosecution in the instant case impliedly found that good cause was shown for the delay, and that petitioner had not been deprived of his constitutional right to a speedy public trial. Until there is some showing that such determination is erroneous, this court must hold in a habeas corpus proceeding, that the detention is lawful, and therefore the writ of habeas corpus is unavailable.

The writ is denied, and the petitioner remanded.

We concur: THOMPSON, J., PLUMMER, J.

---

23 Cal.App.2d 184

NICHOLAS et ux. v. CHLOUPEK.

Civ. 10530.

District Court of Appeal, First District, Division 2, California.

Oct. 18, 1937.

Hearing Denied by Supreme Court Dec. 16, 1937.

1. Automobiles 🔑244(36)

In action for injuries allegedly sustained by plaintiff who parked her automobile about five feet behind defendant's automobile parked with its motor running on ice company's premises in position requiring defendant to back up before pulling out, jury was justified, under evidence, in concluding that plaintiff, who attempted to show connection between contact of automobiles when defendant backed at about one mile per hour and alleged injuries, had willfully perjured herself and that alleged injuries had no connection with contact.

2. Automobiles 🔑244(45)

Where plaintiff parked her automobile about five feet behind defendant's automobile parked with its motor running on ice company's premises in position requiring defendant to back up before pulling out, jury was justified in concluding that plaintiff was contributorily negligent, and so was barred from recovering for injuries allegedly sustained when bumper of defendant's automobile came in contact with plaintiff's automobile while backing up at about one mile per hour.

3. Appeal and error 🔑1170(6)

That portion of trial was held in judge's absence was no ground for reversal, even if appellants could present point on appeal and rely upon affidavits submitted for use on intended motion for new trial which was never made, where affidavits did not show where judge went, how long he was away from bench, or that any proceedings were had in his absence, and there was no showing that appellants objected to judge's failure to suspend trial and admonish jury before leaving courtroom, or that any prejudice resulted (Const. art. 6, § 4½).

4. Appeal and error 🔑259

A party may not sit idly by during trial without objecting to trial judge's absence, take a chance on obtaining a favorable verdict, and, in event of return of unfavorable verdict, demand reversal without showing of any prejudice (Const. art. 6, § 4½).

◆

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by A. S. Nicholas and wife against E. D. Chloupek. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Joseph E. Isaacs and Alan H. Critcher, both of San Francisco, for appellants.

Frank V. Campbell and Harvey C. Miller, both of San Jose, for respondent.

SPENCE, Acting Presiding Justice.

Plaintiffs sought to recover for alleged personal injuries sustained by Mrs. Stephanie Nicholas. The answer denied any negligence on the part of defendant, denied that any injuries had been sustained by said plaintiff, and affirmatively alleged contributory negligence on the part of said plaintiff. Upon a trial by jury, a verdict was returned in favor of defendant and judgment was entered thereon. A notice of intention to move for a new trial was filed, but the intended motion was never brought to a hearing. Plaintiff appeals from the judgment.

Appellants contend that the verdict was contrary to the evidence, but we find no merit in this contention. While the evidence might be said, as a matter of law, to require a finding of negligence on the part of respondent, it is apparent that such negligence was slight. The jury may have found, however, that no injury was suffered by reason of such negligence or that Mrs. Nicholas was herself guilty of contributory negligence. Either finding would sustain the verdict and would find support in the evidence.

[1, 2] The accident occurred near the loading platform on the premises of the Mountain View Ice Company. The parties had gone there in their respective automobiles to obtain ice. Respondent's car was parked with the motor running in a position where it was necessary for him to back up before pulling out. Mrs. Nicholas parked her car about five feet behind respondent's car. Respondent entered his car and backed it at the rate of about one mile per hour. His bumper came in contact with Mrs. Nicholas' car. The disinterested witnesses who were in the vicinity heard no noise from any contact between the cars and could see no injury to either the car or to Mrs. Nicholas. Respondent testified that he felt no impact whatever between the cars. An attempt was made through the testimony of Mrs. Nicholas to show a connection between the contact of the cars and alleged injuries to Mrs. Nicholas and her car. The record disclosed that this witness was thoroughly impeached and the jury was justified in concluding from her evidence and the evidence offered by respondent that she had willfully perjured herself and that the alleged injuries had no connection with the contact of the two automobiles. Furthermore, the jury was justified in concluding that Mrs. Nicholas was guilty of contributory negligence in parking her car immediately behind the car of respondent under the existing circumstances.

[3, 4] Appellants further contend that "a portion of the trial was held in the absence of the court." The record of the trial does not disclose this situation, but appellants rely upon affidavits submitted for use on the intended motion for new trial. As above indicated, the motion was never made. Assuming, without deciding, that appellants may present the point on appeal and may rely upon said affidavits under these circumstances, appellants have shown no sufficient ground for a reversal of the judgment. The affidavits show that the trial judge left the bench and the courtroom during the reading of a deposition; that counsel for appellants "then and there" called the attention of counsel for respondent to the absence of said judge; and that counsel "thereupon * * * ceased reading from said deposition." The affidavits do not show where the trial judge went or whether he was within hearing. They do not show how long the trial judge was away from the bench nor that any proceedings whatever were had in his absence. But more than this, there is no showing that appellant made any objection during the trial to the failure of the trial judge to suspend the trial and to ad-

monish the jury before leaving the courtroom nor is there any showing that any prejudice whatever resulted from said conduct of the trial judge. We are satisfied a party may not sit idly by during the trial without objecting to such an irregularity, take the chance on obtaining a favorable verdict, and then, in the event of the return of an unfavorable verdict, demand a reversal without the showing of any prejudice. Const., art. 6, § 4½.

Appellant cites and relies upon People v. Tupper, 122 Cal. 424, 55 P. 125, 68 Am. St.Rep. 44, and People v. Blackman, 127 Cal. 248, 59 P. 573, but those cases are clearly distinguishable. In each of said cases it appeared from the affidavits that the trial judge left the courtroom and relinquished control of the proceedings which continued during his absence. Furthermore, both were felony cases decided prior to enactment of article 6, section 4½ of the Constitution, and we are of the opinion that they are not controlling here. See O'Callaghan v. Bode, 84 Cal. 489, 24 P. 269; Texas Power & Light Co. v. Central Texas Battery Co. (Tex.Civ.App.) 256 S. W. 644; Chicago City Railway Co. v. Anderson, 193 Ill. 9, 61 N.E. 999; Allen v. Ames & C. Ry. Co., 106 Iowa 602, 76 N.W. 848; Merchants' Nat. Bank v. Nees, 62 Ind.App. 290, 110 N.E. 73, 112 N.E. 904; Peter Branch of International Shoe Co. v. Blake, 74 Okl. 97, 176 P. 892; Hyatt on Trials, p. 1008, § 981; 17 Am. & Eng.Enc.Law (2d Ed.) 720.

The judgment is affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

---

22 Cal.App.2d 678

BECKJORD v. SLUSHER et al.

Civ. 11512.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1937.

Hearing Denied by Supreme Court Nov. 18, 1937.

1. Attachment ⇨338

Counsel fees which are recoverable as damages resulting from prosecution of an action for conversion of property released pursuant to attachment bond are limited to the reasonable value of the services actually performed, and sum which client has paid or agreed to pay is not conclusive of the value of such services but is only an item of evidence of reasonable value thereof (Civ. Code, § 2969).

2. Attachment ⇨338

Provision of indemnity bond permitting recovery of counsel fees which claimant of attached property "may incur" authorizes recovery of the reasonable value of services actually performed, but not for amount actually incurred, if greater, since any other construction would be attempt to determine amount of damage in anticipation of the breach of the obligation and hence not enforceable (Civ.Code, §§ 1670, 1671, 2969).

3. Trial ⇨194(11)

In action by obligee on indemnity bond to recover attorney's fees incurred by obligee in action on the bond for conversion of property attached by obligor, instruction stating that beneficial results obtained for client was chief matter to take into consideration in estimating the value of the services was properly refused, since it directed the jury on a question of fact (Civ.Code, § 2969).

4. Attorney and client ⇨140

The beneficial result of litigation for client was merely one of number of items for jury to consider in determining reasonable value of attorney's services to client and weight to be given to various items was solely for jury.

5. Attachment ⇨352

In action by obligee on indemnity bond to recover attorney's fees allegedly incurred in previous action on the bond for conversion of property attached by obligor and in present suit, where, prior to institution of present suit, plaintiff rejected defendant's offer to pay $500 in settlement of claim, court properly instructed that, if jury found that plaintiff was not entitled to more than $500 for attorney's fee on appeal in previous action, plaintiff would not be entitled to any fee for prosecution of present action (Civ.Code, § 2969).

6. Attachment ⇨338

In action by obligee of indemnity bond to recover attorney's fees incurred on appeal in previous action on bond for conversion of property attached by obligor and for attorney's fees in present suit, obligee was not entitled to recover fee for services rendered in the trial of the previous case in lower court, when he had been allowed by the court and paid by defendant $2,000 for services of counsel before trial court (Civ. Code, § 2969).

7. Attachment ⚷352

In action by obligee of indemnity bond furnished by attachment plaintiff words "may be" were properly inserted in instruction advising jury that while it is true that time taken in performance of legal services should be taken into consideration in fixing the value thereof, yet it "may be" of minor importance.

8. Attorney and client ⚷140

Amount of time taken in performance of legal services is proper item for jury to consider with other items in arriving at reasonable value of counsel fees, but it is for jury in view of all other circumstances to determine weight to be given such element in arriving at reasonable value of the services rendered.

9. Costs ⚷18

Where judgment in superior court is for an amount which could have been awarded by the municipal court, plaintiff is not entitled to recover costs.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith and Robert W. Kenny, Judges.

Action by J. G. Beckjord against Silas F. Slusher and others. Judgment for plaintiff in an unsatisfactory amount, and plaintiff appeals.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellants.

George M. Breslin and Henry G. Bodkin, both of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiff appeals from:

(1) A judgment for $500 in his favor after trial by jury in an action to recover from defendants as principal and sureties on an indemnity bond.

(2) An order striking his cost bill.

The essential facts are these:

Defendant Silas F. Slusher commenced an action in the superior court of Los Angeles county against Ben H. Chamberlain and Chauncey W. Chamberlain and attached certain personal property. Plaintiff filed a claim for the release of the attached property, claiming to have a chattel mortgage thereon. Thereafter defendant Silas F. Slusher as principal and his codefendants as sureties executed and delivered to the sheriff an indemnity bond pursuant to section 2969 of the Civil Code, reading in part as follows:

"Now, Therefore, the condition of this obligation is such that if the said Silas F. Slusher, as principal, and the said Margaret F. Slusher and John J. Doyle, as sureties, their heirs, executors, administrators, shall well and truly indemnify and save harmless him, the said Sheriff and J. G. Beckjord, claiming to be Mortgagee, their heirs, executors, administrators and assigns, of and from all and every damages, expenses, costs and charges, including all counsel fees for which he, the said Sheriff, and the said J. G. Beckjord, claiming to be Mortgagee, their heirs, executors, administrators or assigns, may incur in consequence of the legal enforcement of the payment of the penalty of this bond, and against all loss and liability which he, the said Sheriff or the said J. G. Beckjord, claiming to be Mortgagee, their heirs, executors, administrators or assigns, shall sustain or in anywise be put to for or by reason of the seizing, levying, taking, retention, disposition or sale by him, the said Sheriff, in said suit, of the property claimed as aforesaid."

Subsequently in an action on the bond against defendants for conversion plaintiff recovered judgment for $12,500, the value of the converted property, and $2,000 attorney's fee for services in the superior court. This judgment was affirmed by the District Court of Appeal and a petition for a hearing in the Supreme Court was denied. Defendants then paid plaintiff the sum of $17,500, the amount of the judgment and interest.

Plaintiff paid his counsel $1,000 on account of services before the appellate court and agreed to pay a balance of $1,500. Demand was thereupon made on defendants to reimburse plaintiff for such fee, which demand defendants refused, but offered plaintiff $500 and no more.

The present action was then instituted to recover $4,500 from defendants, $3,500 for alleged attorney's fee on appeal in the previous action and $1,000 for attorney's fee in the present suit. The jury returned a verdict in favor of plaintiff in the sum of $500. Plaintiff filed a cost bill in the sum of $208, which, on motion of defendants, was stricken.

For grounds of reversal plaintiff urges the following propositions:

First. He was entitled to recover under the bond a sum equivalent to attorney's fees which he had actually incurred and was not limited to a sum equivalent to the reasonable value of the attorney's services rendered to him.

Second. The trial court erred in refusing to instruct the jury thus:

"The beneficial result obtained for the client is the chief matter to take into consideration in estimating the value of the services."

Third. The trial court erred in instructing the jury as follows:

(a) "If you find that the reasonable value of the services of Mr. John A. Jorgenson on said appeal is no more than $500.00, then notwithstanding any other instruction given you herein the plaintiff would not be entitled to the award of any attorney's fee for the prosecution of this action now on trial."

(b) "You are instructed that if you find from the evidence that plaintiff's attorney, John A. Jorgenson, in preparing for the trial of J. G. Beckjord, plaintiff, v. Wm. I. Traeger as sheriff of the County of Los Angeles, State of California, and Silas F. Slusher, Margaret F. Slusher and John J. Doyle, in the superior court of the State of California, in and for the county of Los Angeles, or during the course of said trial, prepared the law pertaining to said case, and thereafter was enabled to use such knowledge of the law in writing the briefs on behalf of respondent on appeal, that plaintiff will not be entitled to collect in the present action the value of his services so rendered in the superior court, in preparing for the trial, but plaintiff will only be entitled to recover the reasonable value of the services actually rendered by the attorney in connection with the appeal of said cause (and for the prosecution of this action)."

Fourth. The trial court erred by inserting in the following instruction the words "may be":

"While it is true that the time taken in the performance of legal services should be taken into consideration in fixing the value thereof, yet it may be of minor importance."

Fifth. It was error for the trial court to grant defendant's motion striking plaintiff's cost bill in the present action.

[1] The first proposition is untenable. The law is settled that counsel fees which are recoverable as damages resulting from the prosecution of an action for the conversion of property released pursuant to an attachment bond are limited solely to the reasonable value of the services actually performed (Moore v. Maryland Casualty Co., 100 Cal.App. 658, 666, 280 P. 1008), and that the sum which the client has paid or agreed to pay is not conclusive evidence of the value of such services but is only an item of evidence of the reasonable value of such services.

[2] Any other construction of the clause in the bond providing for the payment of counsel fees would be an attempt to determine the amount of damage in anticipation of the breach of the obligation and not enforceable (Civ.Code, §§ 1670, 1671), since it is not impracticable nor extremely difficult for the court to fix the actual damage which the obligee on the bond has suffered by reason of the breach thereof. Eastman v. Sunset Park Land Co., 35 Cal.App. 628, 630, 170 P. 642.

[3, 4] The instruction set forth in plaintiff's second proposition was properly refused by the trial court. The instruction directed the jury upon a question of fact which was a matter solely for their determination. The beneficial result of the litigation for the client was merely one of a number of items for the jury to consider in determining the reasonable value of the attorney's services to his client, and the weight to be given to the various items was a question for the sole determination of the jury.

[5] The trial court properly read to the jury the instruction set forth in paragraph (a) of plaintiff's third proposition. It is conceded that prior to the institution of the present suit defendants offered to pay plaintiff $500 in settlement of his claim, which offer he rejected. Therefore, assuming that the jury found, as it did, that plaintiff was not entitled to recover more than $500, he in fairness should not be permitted to penalize defendants because he saw fit to institute needless and unnecesary litigation.

[6] Likewise, the instruction set forth in paragraph (b) of plaintiff's third proposition is a correct and accurate statement of the law. It needs no citation of authority or argument to support the proposition stated therein that plaintiff was not entitled to recover in this action an attorney's fee for

services rendered in the trial of the previous case in the lower court, when, as it is conceded, he had been allowed by the court and paid by defendants $2,000 for the services of his counsel before the trial court.

[7,8] The trial court properly inserted the words "may be" in the instruction set forth in the plaintiff's fourth proposition. The amount of time taken in the performance of legal services was a proper item for the jury to consider with other items in arriving at the reasonable value of the counsel's fee in question; however, it was for the jury, in view of all other circumstances of the case, to determine the weight to be given to this element in arriving at the reasonable value of the services rendered by counsel to plaintiff.

[9] Plaintiff's final proposition is without merit. The law is settled that, where the judgment in the superior court is for an amount which could have been awarded by the municipal court, a plaintiff is not entitled to recover his costs. Leaper v. Gandy (Cal.App.) 71 P.(2d) 303; Lady v. Palen, 12 Cal.App.(2d) 3, 4, 54 P.(2d) 1134.

The judgment and order appealed from are and each is affirmed.

We concur: CRAIL, P. J., WOOD, J.

KEY NUMBER SYSTEM

23 Cal.App.2d 45

TEMPLAR MINING CO. v. WILLIAMS.

Civ. 5849.

District Court of Appeal, Third District, California.

Oct. 4, 1937.

Rehearing Denied Nov. 3, 1937.

Hearing Denied by Supreme Court Nov. 26, 1937.

1. Mines and minerals 🔑50

In action in forcible entry and detainer by assignee of lease of mining lands against lessor, court erred in granting lessors' motion for nonsuit, where lease gave lessee 30 days after notice for compliance with conditions which had not been performed, before forfeiture would be declared, lessors, without notice, entered on premises within four days after last work was done thereon, and while assignee was absent, and thereafter excluded assignee by force (Civ.Code, § 1442).

2. Forcible entry and detainer 🔑4

Where plaintiff in forcible entry and detainer action, has been excluded by force, there has been a forcible entry, though entry was accomplished without force.

3. Abandonment 🔑5

Abandonment is a question of intent, and may be proved by acts or conduct of party alleged to have abandoned property in controversy.

4. Mines and minerals 🔑77

The burden of proving abandonment of mining claim by satisfactory and competent evidence rests on party alleging it.

5. Mines and minerals 🔑77

That there was no one on mining lands when lessors entered without giving 30 days' notice to assignee of lease, as required by terms of lease, was immaterial, where right of possession was still in assignee (Civ.Code, § 1442).

6. Abandonment 🔑3

Nonuser alone, without any intention of abandonment, does not constitute abandonment.

7. Mines and minerals 🔑50

In action in forcible entry and detainer by assignee of lease of mining lands against lessors, testimony of assignee's officer, who had been called under statute by lessors, that assignee replaced certain machinery, and that there was nonuser of premises for four days, was insufficient to show abandonment of premises by assignee so as to entitle lessors to enter (Code Civ.Proc. § 2055).

8. Mines and minerals 🔑50

In action in forcible entry and detainer by assignee of lease of mining lands against lessors, instruction that, if assignee defaulted in any of terms or conditions of lease, lessors were entitled to enter, was erroneous, where lease gave lessee 30 days after notice for compliance with conditions which had not been performed before forfeiture would be declared, and lessors gave no such notice (Civ.Code, § 1442).

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action in forcible entry and detainer by the Templar Mining Company against Leanor Williams, executrix of the estate of T. J. Williams, deceased, Leanor Williams, individually. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment reversed.

Charles L. Gilmore, of Sacramento, for appellant.

W. E. Davies, of Marysville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Action in forcible entry and detainer brought by plaintiff and appellant against defendants and respondents to recover possession of certain mining lands situate in Yuba county. The defendants had judgment, and the plaintiff appeals.

The record shows that on or about the 7th day of April, 1934, the defendants in this action leased certain mining property to parties named therein, who thereupon assigned said lease to the plaintiff in this action. The plaintiff appears to have mined and operated said premises under the lease and option throughout the period involved in this action, the last work being done on April 28, 1936. On that date, work ceased. All tools, machinery, and equipment of every kind and character were left upon the premises. The lease, which, by the way, contained an option to purchase, contained the following clause: "In the event of the violation of any of the terms or conditions of this agreement by second parties, or failure or neglect to make payments as herein provided, and in the event such default or failure is not cured within thirty (30) days from and after written notification by first parties, this agreement may, at the option of first parties, be canceled, and first parties shall retain all moneys paid as liquidated rent for the use and occupancy of said premises by second parties."

On May 2, 1936, the respondents entered upon the leased premises, took possession of the same, located the gates leading thereto on one road, and on the only other remaining road felled a tree across it so as to block ingress. On May 12, 1936, the plaintiff caused to be personally served on defendants a written demand for the possession of the premises, together with all mining machinery, etc. This demand, not having been complied with, the plaintiff filed its complaint in this action. At the conclusion of plaintiff's case in chief, the court granted the defendants a nonsuit on the question of forcible entry.

[1,2] The first contention of the appellant that the court erred in granting the defendants' motion for nonsuit on the question of forcible entry appears to be well taken. The record shows that possession was taken by the defendants on the 2d day of May, 1936, while the employees of the plaintiff were absent therefrom; but it also shows that the plaintiff and its employees were excluded by force by the defendants after the taking possession of the premises referred to. Which brings the case within the rule laid down in Kerr v. O'Keefe, 138 Cal. 415, 71 P. 447, where it is held: If the entry is accomplished without force, but is retained and the plaintiff is excluded by force, there has been a forcible entry. So far as we have been advised, this rule has not been modified.

Section 1442 of the Civil Code reads: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." As just stated, the lease involved in this action requires a notice to be given by the lessor to the lessee stating the alleged failure to perform the conditions of the lease by the lessee, and that, unless such conditions are complied with within thirty days, a forfeiture will be declared.

In Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 P. 369, 371, we find the following language applicable here: "The event which causes the forfeiture is the failure of the lessee to perform any of the conditions embodied in the lease for a period of 30 days after notification. * * * It is only upon the giving of this notice and the failure to perform the conditions mentioned therein that the forfeiture can be declared. This is the condition which must happen in order to give a right to declare the forfeiture."

In Metzler & Co. v. Stevenson, 217 Cal. 236, 18 P.(2d) 330, a like question was before the court, and the court there, referring to the case which we have just cited and also to the more recent case of Jones v. Pier et al., 124 Cal.App. 444, 12 P.(2d) 646, where there was a like provision in the lease, held that the language of the lease was controlling, and that there could be no forfeiture until notice had been given allowing thirty days within which to comply with the terms of the lease. It was further held that the lessors must all join in giving the notice. In the instant case the record shows that there has been an entire absence of any attempt even by the lessors to give the plaintiff the notice required by the terms of the lease. No portion of the transcript has been cited by any of the parties showing the giving of such notice, and we have been unable to find anything in the record establishing compliance with the terms of the lease in this particular. From this it follows that the entry by the defendants upon the leased premises on the 2d day of May, 1936, four days after the last work was done on the premises by the plaintiff, was wholly unwarranted and not in accordance with the terms of the lease.

As a defense to the action the respondents argue that the plaintiff had abandoned the mining premises prior to the 2d day of May, 1936. The testimony upon this question is substantially as follows: That the actual mining operations on the premises ceased on January 19, 1936; that some time prior to May 2, 1936, an attachment had been levied upon the mine for a debt in the sum of over $3,000. This attachment, however, had been released prior to the 2d day of May, 1936. The lease called for work to the extent of fifty shifts per month. It does not appear that this number of shifts were actually performed. It is claimed by the respondents that the shaft on the mine had been permitted to remain in a flooded condition, whereby the timbers and lagging rotted and decayed. Our attention has not been called to any testimony supporting this contention. It is further contended that the financial condition of the company was such that it was unable to pay its debts; that on the 28th day of April, 1936, actual work on the premises ceased.

It is further contended by the respondents that the plaintiff gave permission to a certain company to remove the mill on said premises, and in support of this contention called an officer of the plaintiff and examined him under the provisions of section 2055 of the Code of Civil Procedure. This witness testified as follows: "I am president of the Templar Mining Co., and the company purchased part of the mill on the premises from the U. S. Machinery Co. Prior to May 2, 1936, we gave permission to the U. S. Machinery Co. to take away the crushers because the crusher was giving us trouble and we replaced it by another crusher. We had made arrangements with the U. S. Machinery Co. in regard to the mill which had been giving us trouble. They were to take the ball mill out and give us credit and put in another mill in place of the one on the premises. Mr. Williams took possession of the property before we had a chance to get the other one on there. We had made arrangements with the U. S. Machinery Co. to make the change. They were to take away the ball mill. The mill itself consists of more than the ball mill. You have to have the other equipment along with the mill. On May 2nd the mill that was on the premises had been placed there by my company and a portion of it had been purchased from the U. S. Machinery Co. Nothing had been removed prior to that time except the crusher that was giving us trouble. We had them take it away and replaced it by another crusher. The mill consisted of a 30-ton cyanide plant, grizzly belt feeder, ball mill, classifier, several different cyanide things. You have to have different solution tanks, water tanks. It was a complete plant. We purchased it as a complete 30-ton cyanide plant. There was also the assay office with assay equipment. As far as I know, that equipment which we purchased from the U. S. Machinery Co. was there on the 29th day of April, I don't know whether it was subsequently removed or not. None of our members have been allowed on the property since, as I understand it. We did not give the U. S. Machinery Co. permission to remove the equipment purchased from them. We gave them permission to remove the ball which was to be replaced by another mill. That was sometime in April. * * * I saw Mr. Henry in connection with the removal of the mill either in March or April of this year. I think Mr. Henry was up to the mine the latter part of April. He went up to get the ball mill and the classifier. The classifier was removed along with that. It was under capacity of what he agreed to do."

[3,4] In Thornton v. Phelan, 65 Cal. App. 480, 224 P. 259, 260, the court had before it the question of abandonment and, after a review of the cases, said: "The decisions are uniform in holding that abandonment is a question of intention, and that abandonment may be proved by the acts and conduct of the party alleged to have abandoned the property in controversy. The burden also rests upon the party

alleging abandonment to prove the same by satisfactory and competent evidence." In that case all the evidence on the subject of abandonment consisted of a failure to pay taxes, the cessation of work, and the forfeiture of its rights to do business by failure of payment of corporation taxes. It was held the evidence was insufficient to establish the fact of abandonment.

The principle set forth in the case of Thornton v. Phelan, supra, has been approved in the following cases, which we simply cite, omitting quotations therefrom: Clement v. Reynolds, 117 Cal.App. 484, 4 P.(2d) 286; Booth v. Los Angeles County, 124 Cal.App. 259, 12 P.(2d) 72; Nelson v. Schoettgen, 1 Cal.App.(2d) 418, 36 P.(2d) 665; Alberti v. Jubb, 204 Cal. 325, 267 P. 1085; City of Los Angeles v. Abbott, 129 Cal.App. 144, 18 P.(2d) 785.

[5] That there was no one on the premises on the 2d day of May, 1936, when the respondents entered the same, is wholly immaterial, as the right of possession was still in the plaintiff. White v. Pfieffer, 165 Cal. 740, 134 P. 321.

[6] All the cases hold that nonuser alone without any intention of abandonment, does not constitute abandonment. We cite only the leading case of Utt v. Frey, 106 Cal. 392, 397, 39 P. 807.

[7] The respondents rely upon the case of Riedman v. Barkwill, 139 Cal.App. 564, 34 P.(2d) 744. The facts recited in the opinion in that case readily distinguishes the holding there had from what should be our decision in this case. In the Barkwill Case the defendants, on the 29th day of April, 1930, discontinued all operations, and conveyed all of the property located on the premises, to other parties; that they then vacated and abandoned the premises, and made no further attempt to perform any work thereon. The plaintiff had made frequent demands upon the defendants to proceed with the work. On April 29, 1930, the plaintiff served a notice upon the defendants of their default and demanding their performance; that six months before January 19, 1931, the Oil Tool Exchange had acquired all personal property except the casing, and that the parties, for several months, negotiated for the purchase from plaintiff, of such property, including the casing. The well was idle from the 29th day of April, 1930, until January, 1931. It was held that the facts found in that case justified the conclusion that the defendants had abandoned the premises. In the Barkwill Case it thus appears that many months had elapsed without any work being done upon the premises, and that whatever property belonged to the defendants had been disposed of by them. Nothing of that kind appears in the present case, and just as said in the case of Herbert v. Graham, 72 Cal.App. 314, 237 P. 58, 59, giving the most favorable interpretation (for plaintiff): "We are of the opinion that the evidence fails entirely to show any abandonment, but on the contrary, it at most shows a mere disuse or nonuser of the grant for the period of 6 or 7 months" (here, only four days). The court in the Graham Case further said: "While the question of abandonment is one of intention, to be determined only upon an investigation of all the facts and circumstances, still, where there is no dispute as to the facts or the inferences to be drawn therefrom, the question becomes one of law." The testimony shows simply a negotiation as to an exchange of certain machinery and a nonuse of the premises for four days. We see no escape from the conclusion that such testimony is insufficient to support the theory of abandonment.

[8] As further grounds for reversal the appellant urges that the court erred in its instructions to the jury, and especially calls our attention to the following one which was modified by the court to read as follows: "If you should find from the evidence that the plaintiff entered into the possession of said mining property under an option or agreement for the purchase of the same, and that the plaintiff made default in any of the terms, conditions, payments and covenants in said contract, on its part to be paid, kept or performed, without any lawful excuse, then the defendants were lawfully entitled to take possession of said premises in accordance with the option agreement entered into, and their entry upon said land was not unlawful, and you should find for the defendants."

As authority for the foregoing, such cases as Baxley v. Western L. & B. Co., 135 Cal.App. 426, 27 P.(2d) 387, and Champion Gold Min. Co. v. Champion Mines, 164 Cal. 205, 128 P. 315, are cited. A reference to these cases shows that the lease or instrument under consideration contained provisions to the effect that, upon default in the performance of any of the conditions specified, the lessor was entitled to take immediate possession. Every case relied upon to support the instruction just quoted contains such a provision, which renders every one of them inapplicable, in view of the fact that the lease and option agreement contained a clause requiring notification to be given, and that forfeiture could not be claimed until thirty days thereafter.

We do not need to refer to other instructions following the same line, as the error here complained of, by noticing the distinction in the cases, will probably not again be committed.

It follows from what we have said that the judgment of the trial court should be reversed, and it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

---

23 Cal.App.2d 205

JAMES et al. v. ALLEN.

Civ. 5744.

District Court of Appeal, Third District, California.

Oct. 19, 1937.

1. Sales 🔑479(11)

Where conditional sales contract provides that seller may repossess goods, sell them for account of buyer, and sue for balance, such proceeding will be upheld, but where contract does not so provide, but gives seller choice of remedies, seller is bound by his election.

2. Sales 🔑479(11)

Under conditional sales contract providing that on buyer's default seller might enforce payment of entire principal and interest or take possession without legal process, seller, by taking possession without legal process, made election of remedies which barred action for balance allegedly due after deduction of amount realized from sale of repossessed property.

3. Sales 🔑479(11)

Under ordinary conditional sales contract which does not expressly confer on seller right to recover balance of purchase price after reselling property, if seller, as owner, takes possession on buyer's default, and, as such owner, sells or otherwise uses property, seller cannot recover any portion of unpaid purchase price.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by W. E. James and another against W. V. Allen. From a judgment for defendant, plaintiffs appeal.

Affirmed.

W. E. James, of Bakersfield, for appellants.

Mr. Justice PLUMMER delivered the opinion of the court.

Plaintiffs began this action to recover from the defendant the sum of $561, being the amount alleged to be due for and on account of a conditional sales contract, where the property was repossessed by the seller and resold. The original contract covered personal property of the sale value of $1,025, conditioned for certain installment payments which were not made.

The plaintiffs, assignees of the seller, took possession of the property, sold the same, and began this action for the balance alleged to be due on account of the contract price. The defendant had judgment. From this judgment the plaintiffs appeal.

The sale was made at public auction conducted by the assignees, after notice to the buyer that the sale would be made for his account. The cause is before us upon the judgment roll alone.

The findings of the court show that the plaintiffs had, by their election to repossess the property, waived the right of bringing an action for the purchase price, as well as for the balance due after making sale of the property for the alleged account of the buyer.

[1] A consideration of the different cases leads to the conclusion that every case is governed by the provisions of the contract of sale, and where the contract provides that the vendor or seller may repossess the goods, sell the same for the account of the vendee or purchaser, and sue for the balance of the purchase price, that proceeding will be upheld, but where the contract does not so provide, but gives the vendor a choice of remedies, he is bound by his election.

[2] The contract involved in this action reads as follows: "It is also agreed that should vendee fail to pay any of the installments when due, or to perform any of the aforesaid conditions, or said property be attached or levied upon, all of said sum that remains to be paid shall become immediately due and payable, and vendor may enforce payment of the entire sum then unpaid, and interest thereon; or may, if he so elect, rescind this executory contract and take possession without legal process, of that property, and for that purpose may enter any premises where the same may be."

It will be seen that the contract in this case limits the vendor to his election between two remedies, and that he cannot, after proceeding with one remedy, go back and institute an action upon the other. In this case the plaintiffs elected to rescind and repossess the property.

[3] The proceedings had in this case cause the rights of the plaintiffs to be limited to the rule set out in the notes found in 83 A.L.R. 960, and the cases there cited. The note reads as follows: "As pointed out in the annotation in 37 A.L.R. 91, by the great weight of authority, in the absence of statutory provisions to the contrary, under the ordinary contract of conditional sale which does not expressly confer upon the seller the right to recover the balance of the purchase price after reselling the property for a sum less than that remaining unpaid, if the seller, as owner, takes possession of the property upon default of the buyer, and as such owner sells or otherwise uses the property, he cannot recover any portion of the unpaid purchase price." Following this statement are a large number of cases cited, including many from California. To the same effect is the rule stated in 55 C.J. 1272, § 1288. Here, the property was taken without process of law, and must be held to have been taken according to the terms of the contract.

In the recent case of Cocores v. Assimopoulos, 127 Cal.App. 360, 15 P.(2d) 892, 893, the court in its opinion says: "The law seems well settled that the vendor under a conditional sales contract is given an election of remedies. He may terminate the contract, retake the property, and retain the money theretofore paid, or he may treat the transaction as a sale and sue for the balance of the purchase price"—Citing a number of cases.

In Bagwill v. Spence, 127 Cal.App. 263, 15 P.(2d) 810, 812, the court had before it a similar question, and quoted from Johnson v. Kaeser et al., 196 Cal. 686, 239 P. 324, as follows: "It is settled by an unbroken line of decisions that, as to such a contract, it is optional with the seller upon default by the purchaser in complying with any one of the vital terms of the agreement, either to treat the contract as involving a conditional sale and retake possession of the property, or ratify the contract as one involving an absolute sale of property, and so sue for the recovery of all moneys then payable thereunder. In other words, the seller in such case is vested with the right to exercise an election as between the two remedies"—Citing a large number of authorities.

The appellant relies upon the case of Jeanson v. Zangl, 119 Cal.App. 692, 7 P.(2d) 314, and Matteson v. Equitable M. & M. Co., 143 Cal. 436, 77 P. 144. These cases are readily distinguishable from cases where the contract limits the right of the vendor, as is the case with the contract under consideration here.

As supporting what we have said limiting the right of the plaintiffs to their election, we may cite also the case of Frankel v. Rosenfield, 95 Cal.App. 647, 273 P. 122, where it is held that the proceedings, such as taken by the plaintiffs in this action, are inconsistent and that, after repossessing the property, an action will not lie for the purchase price.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

23 Cal.App.2d 168

PEOPLE v. LEE.

Cr. 3020.

District Court of Appeal, Second District, Division 2, California.

Oct. 15, 1937.

1. Assault and battery 🔑95

An iron bar may be a "deadly weapon," but it is not a deadly weapon as a matter of law.

[Ed. Note.—For other definitions of "Deadly Weapon," see Words & Phrases.]

2. Assault and battery 🔑95

Whether an iron bar is a deadly weapon is a mixed question of law and fact.

3. Criminal law 🔑1159(5)

In prosecution for assault with deadly weapon, where jury found defendant guilty of crime of simple assault, appellate court could not set aside jury's finding that gas pipe used in committing assault was not a "deadly weapon," as against contention that defendant was guilty of crime of assault with deadly weapon or no crime at all.

4. Assault and battery 🔑91

Evidence supported finding of jury that defendant was guilty of crime of simple assault.

5. Conspiracy 🔑23

To constitute "conspiracy," it is not necessary that the defendants enter into an elaborate and detailed agreement prior to commission of any overt act, but it is only necessary that each has adopted a common design with knowledge and consent of the other to constitute them "conspirators."

[Ed. Note.—For other definitions of "Conspiracy" and "Conspirator," see Words & Phrases.]

6. Criminal law 🔑791

In prosecution for assault, evidence disclosing that defendant pommeled an officer while codefendant sat on officer's stomach to hold him down authorized conspiracy instruction.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Jason Lee was convicted of the crime of simple assault, and he appeals.

Affirmed.

George H. Shreve, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant Jason Lee was charged jointly with Frank Burke upon an information with the crime of assault with a deadly weapon upon the person of one Thomas B. Washburn. The defendants were found guilty and convicted of the crime of simple assault. This appeal is taken by the defendant Jason Lee from the judgment and from the order of the court denying defendant's motion for a new trial.

The defendant's first contention is that the evidence is insufficient to support a verdict of simple assault, in that the only evidence of assault was evidence of the use of a club or possibly a short length of gas pipe, and that therefore the defendant was guilty of assault with a deadly weapon or no crime at all. According to the testimony, officers Washburn and Beach entered a café owned and operated by the defendant Lee and managed by defendant Burke, made a purchase of whisky, and then attempted to place the defendants under arrest for selling liquor between the hours of 2 and 6 a. m. A fight ensued wherein both police officers were badly beaten. Officer Washburn was forced down on the floor. Defendant Beach sat on him and held his hands. Defendant Lee hit him several times over the head with the club or gas pipe. Officer Washburn was otherwise kicked and beaten about the body.

[1–3] While it is true that an iron bar may be a deadly weapon (People v. Carr, 131 Cal.App. 644, 21 P.(2d) 967), it is not a deadly weapon as a matter of law. Whether it is or is not a deadly weapon is a mixed question of law and fact. People v. Simpson, 134 Cal.App. 646, 651, 25 P.(2d) 1008; People v. Valliere, 123 Cal. 576, 56 P. 433. The trial court properly instructed the jury, defining a deadly weapon. It also instructed the jury as follows: "You are instructed that the offense known as simple assault is one necessarily included in the offense known as assault with a deadly weapon, and if you have a reasonable doubt that the defendants or any of them used a deadly weapon in the perpetration of an assault, you may nevertheless find them guilty of simple assault if such simple assault has been conclusively proven to you beyond a reasonable doubt." This court on appeal would not be justified in setting aside the finding of the jury that the gas pipe was not a deadly weapon.

[4] Futhermore, there is substantial evidence to support a finding of the jury of simple assault, even though the jury rejected all of the testimony relating to the gas pipe.

[5, 6] It is the final contention of the defendant that the court erred in instructing the jury on the question of conspiracy, on the ground that there was nothing in the facts of the case to justify such instructions. In order to constitute conspiracy, it was not necessary that the defendants enter into an elaborate and detailed agreement prior to the commission of any overt act. It is only necessary that each has adopted a common design with the knowledge and consent of the other to constitute them conspirators. That this was the case in the present instance is supported by substantial evidence. Among other things, there is testimony that Burke sat on Washburn's stomach to hold him down while Lee pommeled him. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Holmes, 118 Cal. 444, 50 P. 675; People v. Brown, 99 Cal.App. 117, 277 P. 908.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, J.

9 Cal.2d 718

GIBSON et al. v. MITCHELL et al.

L. A. 15598.

Supreme Court of California.

Oct. 19, 1937.

1. Schools and school districts 🔑22

Statute relating to liability for bonded indebtedness of territory withdrawing from a union high school district would not be construed to operate retroactively in absence of expressed intention or any good reason why it should so operate (School Code, §§ 2.640–2.642 and § 2.74 as added by St. 1931, p. 2200).

2. Schools and school districts 🔑22

Statute providing that territory withdrawing from a union high school district shall remain liable on its proportion of bonded indebtedness of union district to the same extent as before withdrawal, enacted subsequent to withdrawal of territory from union district which agreed to assume entire indebtedness if withdrawing territory established a four-year high school of its own, did not impose liability for such indebtedness on withdrawing district in absence of intention that statute was to operate retroactively (School Code, §§ 2.640–2.642, and § 2.74, as added by St.1931, p. 2200).

3. Schools and school districts 🔑41(2)

Territory withdrawing from union high school district was not deprived of benefit of union high school district's agreement to assume its entire bonded indebtedness if withdrawing territory established a four-year high school of its own because of territory's alleged default under terms of agreement by reason of board of supervisors' declaration of lapsation of newly organized high school district, where such order of lapsation was invalid because prematurely made (School Code, §§ 2.400, 2.640–2.642).

4. Schools and school districts 🔑44

Under statute providing for beginning of school year on July 1 and ending thereof on June 30, and providing for suspension of a high school district which has an average daily attendance of less than ten during any year after the first year, an order of lapsation of district which was created on June 10 for failure to maintain required attendance during immediately ensuing school year was void for prematurity, since the twenty days remaining in school year following new district's creation did not constitute its "first school year" (School Code, §§ 2.400, 3.22).

[Ed. Note.—For other definitions of "School Year," see Words & Phrases.]

5. Equity 🔑72(1)

Laches as ground for denying a party the benefit of an agreement is dependent not only upon delay but also upon injury occasioned by the delay.

6. Schools and school districts 🔑41(2)

Delay of three and one-half years in establishment of new high school district was not such "unreasonable delay" as to deny district benefit of agreement of union high school district from which new district had withdrawn to assume its own entire bonded indebtedness, thus relieving withdrawing territory from liability thereon, if withdrawing territory established a four-year high school of its own, in absence of evidence that union high school district suffered any detriment by such delay (School Code, §§ 2.640–2.642).

[Ed. Note.—For other definitions of "Unreasonable Delay," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Proceeding by John C. Gibson and others, as members of the Board of Trustees of Laguna School District of Orange County, against John C. Mitchell and others, as members of the Board of Supervisors of Orange County, and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Forgy, Reinhaus & Forgy and Fred Forgy, all of Santa Ana, for appellants.

L. W. Blodget, of Santa Ana, for respondents.

CURTIS, Justice.

This is a controversy between school districts in Orange County. Plaintiffs, as members of the Board of School Trustees of Laguna School District of Orange County, sought and secured a permanent injunction enjoining the defendants, officials and supervisors of Orange County, from levying and collecting taxes upon all the taxable property in the Laguna School District of Orange County for the purpose of providing revenue to pay a portion of the interest and principal of the bonded indebtedness of Tustin Union High School District of Orange County. The total amount of the bonded indebtedness of said Union High School District was $130,000. On February 2, 1931, the Board of Trustees of the Tustin Union High School District and the Board of Trustees of the Laguna School District entered into a written agreement. At that time the Laguna School District, which was an elementary school district, was a part of the Tustin Union High School District, and the agreement was entered into preparatory to the exclusion or withdrawal of the Laguna School District from the Tustin Union High School District. The agreement, the interpretation of which gave rise to the present controversy, reads as follows:

"This Agreement made and entered into this 2nd day of February, 1931, by and between the Board of Trustees of Tustin Union High School of Orange County and Laguna School District of Orange County, California:

"Witnesseth: Whereas, petitions have been presented to the County Superintendent of Schools of Orange County, California, signed by a majority of the qualified electors residing in the Tustin Union High School District and two-thirds of the qualified electors residing in the Laguna School District of Orange County, requesting that an order be made for the exclusion of said Laguna School District from said Tustin Union High School District;

"Now, therefore, in consideration of the premises, the undersigned Boards of Trustees of said Tustin Union High School District and said Laguna School District do hereby consent to the exclusion of said Laguna School District from said Tustin Union High School District upon the following terms and conditions:

"First: That in the event an order shall be made in accordance with the terms of this agreement excluding the said Laguna School District from the said Tustin Union High School District, the said Tustin Union High School District shall assume all bonded and other indebtedness now existing against said Union High School, only upon the happening of either of the following events: (a) That said Laguna School District shall by voting high school bonds or by taxes or some other means, establish a four-year high school in said Laguna School District; or (b) * * *

"Second: It is further understood and agreed that for a period of not to exceed two years from the date said Laguna School District shall be legally excluded from said Tustin Union High School District, the said Laguna School District shall pay to the said Tustin Union High School fund only its pro-rata share for the Laguna School District students remaining in attendance at said Tustin Union High School, after said exclusion shall become effective, and until such time as provisions shall be made for said students in said Laguna School District either by the formation of a high school district or the admission of said Laguna School District to some other high school or union high school district, not to exceed the period of two years herein provided for.

"Third: We do hereby, for our respective districts, consent and agree that if said petitions shall be found to be sufficient by the County Superintendent of Schools the Board of Supervisors of the County of Orange may make an order excluding said Laguna School District from said Tustin Union High School District in the manner provided in section 2.640 et seq. of article 8, of chapter 9 of the School Code of the State of California, and in accordance with the terms of this agreement."

The sections of the School Code which furnish statutory authority for the exclusion and withdrawal of an elementary school district from a union high school district read as follows:

Section "2.640. Whenever a majority of the heads of families, or a majority of the electors residing in any union or joint union high school district, and two-thirds of the heads of families or of the electors residing in any school district which is a part thereof, as shown by the affidavit of one or more of the petitioners, shall present to the superintendent of schools who has jurisdiction over the high school district. petitions asking for the exclusion of said school district from the high school district, accompanied by an agreement signed by a majority of the high school board of the high school district and a majority of the trustees of the school district, consenting to the exclusion and setting forth the terms thereof, the superintendent of schools shall, after verifying the signatures thereto and finding them sufficient, transmit the petitions and agreement to the board of supervisors of his county, with his recommendation thereon.

"2.641. The board of supervisors after receiving the petition and agreement from the superintendent of schools, together with his recommendation, may thereupon, in their discretion, make an order excluding the school district from the high school district upon the terms agreed upon.

"2.642. No school district shall be excluded from a high school district having an outstanding bonded indebtedness where the exclusion would so reduce the amount of taxable property in the high school district that the outstanding bonded indebtedness would exceed five per cent of the taxable property of the high school district, after the exclusion, as shown by the last equalized assessment of the county or counties in which the high school district is located."

Pursuant to said statutory authority, the Board of Supervisors of Orange County, after a petition had been filed with said board, pursuant to the provisions of section 2.640 of the School Code, accompanied by a copy of the agreement of February 2, 1931, and by a certificate of the County Superintendent of Schools certifying to the sufficiency of the said petition, made its order excluding the Laguna School District from the Tustin Union High School District on February 17, 1931. Subsequent to said order of exclusion, a new section, 2.74, was added to the School Code (St.1931, p. 2200), effective as of August 14, 1931. This section read as follows: "Whenever any territory withdraws from a union elementary or union high school district, the territory withdrawing shall continue to be liable for such proportion of the bonded indebtedness, incurred before such withdrawal, of such union elementary school district or union high school district, as the case may be, as it would have been liable for had it not withdrawn." On June 7, 1932, an election was held in the Laguna School District for the formation of a high school district, and on June 10, 1932, after a canvass of the election, the Laguna High School District was declared created, which said high school district was territorially coextensive with the Laguna School District. Thereafter the pupils of the Laguna High School District, in accordance with the original agreement of February 2, 1931, and a subsequent agreement of August 2, 1932, between the Tustin Union High School District and the Laguna High School District, continued to be cared for by the Tustin Union High School District. On July 3, 1933, the superintendent of schools filed with the Board of Supervisors of Orange County a declaration of lapsation of Laguna High School District, under the provisions of section 2.400 of the School Code, and on the same day the Board of Supervisors made an order declaring said Laguna High School District lapsed. Instead of resorting to the courts to test the validity of this order, another election was held in September, 1933, for the reorganization of the Laguna High School District, and on September 12, 1933, the supervisors of said county again declared Laguna High School District organized. On June 5, 1934, an election was held in the Laguna High School District for the purpose of voting bonds for the erection of a high school building in said high school district. On June 19, 1934, the election was declared successful by the Board of Supervisors after a canvass of the returns. Commencing in September, 1934, a high school was conducted in Laguna High School District for the ninth, tenth, eleventh, and twelfth grades during the entire school term of 1934-35 with an average daily attendance of over 175 pupils.

By virtue of the enactment of section 2.74 of the School Code, effective August 14, 1931, did the territory comprised within the Laguna School District which had been excluded on February 17, 1931, from the Tustin Union High School District, upon the condition that the Tustin Union High School District should assume all its own bonded indebtedness, provided the Laguna School District established a four-year high school in said Laguna School District, continue to be liable for such proportion of the bonded indebtedness of the Tustin Union High School District, incurred before such withdrawal, as it would have been liable for had it not withdrawn, despite the fact that the territory has become liable for the satisfaction of the indebtedness created by the creation of a new high school in said territory?

[1, 2] The answer, we think, must be in the negative. The original agreement of February 2, 1931, contemplated two separate actions: (1) The exclusion of the Laguna School District upon the fulfillment of the statutory requirements set out by the School Code heretofore quoted, and

(2) the assumption by the Tustin Union High School District of all of its own bonded indebtedness upon the establishment of a four-year high school in Laguna School District. The order of exclusion was to be made as soon as the statutory requirements were fulfilled, and said order was actually made on February 17, 1931. With reference to the establishment by the Laguna School District of a four-year high school, no time limit was set within which said school district must act in order to secure the benefit of the promise of the Tustin Union High School to assume all of its own bonded indebtedness. The exclusion of Laguna School District was not made dependent upon the establishment of a four-year high school, but was complete when the Board of Supervisors made its order excluding it from the Tustin Union High School on February 17, 1931. It follows, therefore, that unless said section 2.74 of the School Code, which by its language deals only with territory withdrawing from certain school districts, is held to operate retroactively, the Laguna School District, having regularly withdrawn and having been properly excluded from the Tustin Union High School District prior to the enactment of said Code section is not subject to the terms of said section. The section does not purport to operate retroactively, and, in the absence of such an expressed intention, and in the absence of any good reason presented why it should so operate, it will not be so construed. Blade v. Superior Court, 102 Cal.App. 375, 283 P. 81. We are, therefore, of the opinion that the Laguna School District, having actually withdrawn from the Tustin Union High School District on February 17, 1931, prior to the enactment of section 2.74 of the School Code, was not bound by the provisions of that section.

[3, 4] The argument, however, is advanced to this effect, that, conceding that the Laguna High School District created in June, 1932, might have taken advantage of the agreement entered into on February 2, 1931, by the Laguna School District, and by fulfilling the terms of the conditions—the establishment of a four-year high school in the Laguna High School District—have obtained the benefit of the assumption of all of its own bonded indebtedness by the Tustin Union High School, the lapsation of the Laguna High School District under the order of the Board of Supervisors of July 3, 1933, constituted a default under the terms of the agreement, and the Laguna High School District created in 1933 could not benefit by said agreement, but the territory comprised therein was subject to its proportionate share of the outstanding bonds and other expenses of the Tustin Union High School for which the Laguna School District was liable. This argument is not tenable by reason of the fact that it clearly appears that the order of lapsation, based on section 2.400 of the School Code, was prematurely made and, therefore, invalid. The Laguna High School District was created June 10, 1932. On June 30, 1932, according to the definition of the School Code, the school year ended. Section 3.22 of the School Code provides that, "The school year begins on the first day of July and ends on the last day of June." Only twenty days therefore elapsed between the creation of the Laguna High School District and the end of the school year. The next school year was from July, 1932, to July, 1933. During that school year, the Laguna High School District, by virtue of the fact that all of its pupils were being cared for by the Tustin Union High School District according to contract, failed to maintain an average daily attendance of ten pupils. Section 2.400 of the School Code provides that: "When the average daily attendance of pupils in any high school district during the whole of any school year, after the first school year, shall be ten, or less than ten, the superintendent of schools having jurisdiction over the high school district shall suspend the high school in the high school district and shall report the fact to the board of supervisors of his county." Can it be reasonably argued that the twenty days remaining in the school year 1931-1932 after the creation of the school district constituted "the first school year," and that the failure of the district during the ensuing school year to maintain an average daily attendance of ten pupils require the lapsation of said district. We think to ask the question is to answer it. We are of the opinion that, when the order of lapsation was made by the Board of Supervisors, the Laguna High School District had been in existence for only one full school year and that said district was entitled under the provisions of section 2.400 of the School Code to another full school year in which to at-

tempt to maintain an average daily attendance of ten pupils. The order of lapsation being premature was void.

[5, 6] It is further suggested that in any event the delay of three years and a half in the establishment of the four-year high school was unreasonable and that by virtue of this laches the Laguna High School District cannot claim the benefits of the agreement of 1931. Laches is dependent not only upon delay, but also upon injury occasioned by the delay. It has been suggested that, because property values depreciated during the depression, the Tustin Union High School District suffered a detriment. Obviously the taxpayers within the district are subject to no greater burden now than they would have been subjected to had the four-year Laguna High School been established at an earlier date. In view of the fact that the establishment of the new high school required an election for the issuance of bonds, the sale of bonds, and the entering into a contract for the actual erection of the building, it cannot be said that the delay was unreasonable.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; EDMONDS, J.; NOURSE, Justice pro tem.

---

9 Cal.2d 726

FULTON et al. v. WEBB et al.

L. A. 16350.

Supreme Court of California.

Oct. 19, 1937.

Rehearing Denied Nov. 18, 1937.

1. Appeal and error 🔑477
Courts 🔑212

A third party claimant's appeal from adverse judgment, in proceeding to recover personalty allegedly unlawfully seized upon writ of execution, was properly taken to the Supreme Court, since proceeding was equitable in nature, and hence Supreme Court could entertain appellant's petition for writ of supersedeas as matter in aid of appellate jurisdiction (Code Civ.Proc. § 953a et seq., as amended; § 689, as amended by St. 1935, p. 1958).

2. Appeal and error 🔑440

A judgment determining title to personalty, rendered in accordance with statute, was not subject to modification after appeal had been taken therefrom by third party claimant, by requiring appellant to give bond as condition of appeal (Code Civ.Proc. § 953a et seq., as amended; § 689, as amended by St.1935, p. 1958).

3. Appeal and error 🔑460(2)

Where judgment was rendered determining title and adverse claims to personalty, rather than granting money recovery, appeal therefrom by third party claimant automatically stayed order therein directing sheriff to sell property involved, left question of title suspended, and entitled third party claimant to writ of supersedeas (Code Civ. Proc. § 953a et seq., as amended; § 689, as amended by St.1935, p. 1958).

4. Appeal and error 🔑437

Where third party claimant appealed to Supreme Court from judgment determining title and adverse claims to personalty seized under writ of execution, sheriff held such personalty subject to third party claim, and any sale by sheriff before final determination would be at sheriff's risk (Code Civ.Proc. § 953a et seq., as amended; § 689, as amended by St.1935, p. 1958).

5. Sheriffs and constables 🔑90

The sheriff is required to hold property seized under writ of execution only where judgment creditor posts indemnifying bond (Code Civ.Proc. § 689, as amended by St. 1935, p. 1958).

6. Costs 🔑230

Where third party claimant's petition for supersedeas, on appeal from judgment denying claimant's right to property seized under execution, was unsuccessfully opposed by judgment creditors in original execution proceedings, costs would be taxed against judgment creditors (Code Civ.Proc. § 953a et seq., as amended; § 689, as amended by St. 1935, p. 1958).

In Bank.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Suit by J. E. Fulton and others against E. Townsend Webb and others, wherein Sally Ruth Purviance filed a third party claim. From the judgment, Sally Ruth Purviance appealed, but trial court ordered that execution should be stayed only on condition that appellant file a bond. On appellant's petition for writ of supersedeas.

Writ of supersedeas ordered.

S. S. Hahn, and W. O. Graf, both of Los Angeles, for appellant.

Bonelli, Hughes & Miller, Aubry Miller, and Henry E. Phister, all of Los Angeles, for respondents.

NOURSE, Justice pro tem.

Petition by Sally Ruth Purviance, a third party claimant, for a writ of supersedeas. In an action brought in the superior court plaintiffs had judgment for $4,000 and interest. Petitioner claims to be the owner of certain personal property—three bonds of the par value of $1,000 each, which she alleges were unlawfully seized upon a writ of execution and taken from her possession through false representations and deceit. She filed a third party claim under section 689 of the Code of Civil Procedure (as amended by St.1935, p. 1958). The plaintiffs did not bond against redelivery but filed a petition to have the title determined. After hearing thereon, a judgment or order was entered declaring that petitioner was not legally entitled to the bonds but that the legal title was in the judgment debtor subject to plaintiffs' lien. She appealed, but the trial court thereafter made its order that execution should be stayed on the condition only that the petitioner should file a bond in the sum of $3,500, whereby the principal and sureties should undertake to pay to the judgment creditor the full sum of $3,500, together with interest and damages in the event petitioner's appeal from said judgment be affirmed or dismissed. The burden of the petition is that, since the property must remain in the custody of the sheriff throughout the appeal, the trial court could not compel the execution of a bond of this character as a condition of the appeal.

[1] The proceeding on the third party claim was in the nature of an action to quiet title to or to determine adverse claims to personal property, and hence was one in equity. The appeal was properly taken to this court, and this court may therefore entertain the petition as presenting a matter in aid of its appellate jurisdiction.

[2, 3] The judgment on the third party claim was entered on April 2, 1937. On May 13th notice of appeal was filed. Thereafter, and on May 26th the trial court entered a new judgment modifying that of April 2d and requiring the bond as above noted. The judgment of April 2d was rendered in accordance with that portion of section 689 reading: "the court shall give judgment determining the title to the property in question, which shall be conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have said property taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment." As such it was not subject to "modification" after the appeal had been taken. It was a determination of adverse claims to property, and it also directed the sheriff to sell the property to satisfy the judgment creditor in the main suit. Both of these mandatory features of the judgment were stayed by the appeal which was taken under section 953a et seq., Code of Civil Procedure (as amended). 2 Cal.Jur. p. 359; Baar v. Smith, 201 Cal. 87, 255 P. 827. It should be noted that this appeal was not taken from a money judgment nor from the judgment upon which the execution was issued, but it was taken from the judgment determining the title and adverse claims to the property; the order of sale is merely ancillary and incidental to that judgment, and is automatically stayed by the appeal. Baar v. Smith, supra.

[4, 5] The effect of the appeal is to leave this question of title suspended and in the same condition as it was in before trial. The sheriff accordingly holds the property which he seized under a writ of execution subject to the third party claim. If he sells the property before title is finally determined, he sells at his own risk. Section 689 gives the judgment creditor the privilege of relieving the sheriff of that risk by posting a bond to indemnify him, and the section makes it plain that it is only when such undertaking is given that the sheriff is required to hold the property.

[6] These proceedings are defended by the judgment creditors in the original proceedings, and petitioner should have her costs taxed against them.

Let a writ issue as prayed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; KNIGHT, J. pro tem.

22 Cal.App.2d 687

PEOPLE v. CHAMBERS et al.

Cr. 1533.

District Court of Appeal, Third District, California.

Sept. 28, 1937.

1. Insurrection and sedition 🔑2

A count of indictment charging defendants with organizing and knowingly becoming members of designated associations created by them to teach, aid, and abet criminal syndicalism as a means of accomplishing a change in industrial ownership and control of property and effecting political changes, was sufficient and did not fail to state a public offense (St.1919, p. 281, § 2, subd. 4; Pen.Code, §§ 950–952).

2. Insurrection and sedition 🔑2

A count of indictment charging criminal syndicalism by printing, circulating, and distributing books, pamphlets, and documents advocating crime, sabotage, and malicious damage to property by force and violence, was sufficient, even though books and pamphlets were not specifically identified, where there were thirty-two of them consisting of hundreds of pages, and their contents were well known to each defendant (St.1919, p. 281, § 2, subd. 4; Pen.Code, §§ 950–952).

3. Constitutional law 🔑274
Insurrection and sedition 🔑2

The Syndicalism Act is not unconstitutional as violative of Fourteenth Amendment of the Federal Constitution (St.1919, p. 281; Const.U.S. Amend. 14).

4. Criminal law 🔑304(2)

The Court of Appeal would take judicial knowledge of fact that the land is filled with labor disturbances and that sit-down strikes and other forms of strikes have recently occurred in California and elsewhere in which force, violence, unlawful practices, and deaths have occurred.

5. Insurrection and sedition 🔑2

In prosecution for criminal syndicalism, whether there was a present danger of unlawful confiscation of property or political changes on account of defendants' activity *held* for jury under evidence (St.1919, p. 281).

6. Insurrection and sedition 🔑2

It is no defense to a charge of criminal syndicalism against persons who actually organize associations for that purpose and teach, advocate, aid, encourage, and abet confiscation of property and destruction of government by intimidation, force, and violence, that they failed to actually incite revolution because they lacked sufficient votes or physical force to accomplish their purpose (St.1919, p. 281).

7. Insurrection and sedition 🔑2

The law may presume from actual organization of associations for purpose of syndicalism and teaching and advocating principles of Communism by distributing literature and otherwise aiding, abetting, and encouraging others to resort to intimidation, force, and violence to confiscate property and destroy ordained government, that persons so engaged intended to and actually did attempt to carry out avowed policy of confiscating property and destroying institutions of government by force and violence (St.1919, p. 281).

8. Criminal law 🔑31

One may use necessary means to protect himself or his property against unlawful force and violence where there is reasonable cause to believe such force is about to be exercised.

9. Constitutional law 🔑82

The state has a right to protect its citizens against threatened unlawful interference with their persons or property.

10. Criminal law 🔑1163(3)

Where appellate court's attention was not called to rejection of any material evidence tending to show that defendants' conduct did not furnish a present danger of their violation of Syndicalism Act, and nature of proffered evidence was not indicated, appellate court was required to assume that excluded evidence, if any, was merely cumulative and not prejudicial (St.1919, p. 281).

11. Quo warranto 🔑11

The right to a public office must be determined by quo warranto.

12. Insurrection and sedition 🔑5

The executive and legislative branches of both federal and state governments are the only authorities vested with lawful power to quell insurrections, and private persons and organizations have no such vested right.

13. Insurrection and sedition 🔑2

Organizing an association to advocate use of force and violence to confiscate property and to destroy the government is akin to "insurrection" and thus is prohibited by Syndicalism Act (St.1919, p. 281).

[Ed. Note.—For other definitions of "Insurrection," see Words & Phrases.]

14. Criminal law ⚷1166½(6)

Defendants charged with criminal syndicalism could not complain of being restricted in examination of prospective jurors by refusal to entertain questions based on assumption that constitutional guaranty of freedom of speech entitles one to publicly criticize form of government or its officers and to advocate a change of property rights and governmental principles by unlawful means, especially where defendants exhausted all their peremptory challenges, additional challenges were granted, and each challenged juror was excused.

15. Constitutional law ⚷90, 91

Laws should not infringe upon guaranteed freedom of speech and lawful assembly, but there is a clear distinction between freedom of speech and unrestrained license to recklessly or willfully say anything one pleases without regard to the truth.

16. Insurrection and sedition ⚷5

Both federal and state authorities may be used to suppress insurrection.

17. Constitutional law ⚷90

Freedom of speech must be exercised with due regard to personal and property rights of others, and there can be none except such as exists pursuant to law.

18. Statutes ⚷174

Statutory law should be upheld even against the majority in a democracy, and, if a statute is not in accordance with majority's approval, it should be changed in a lawful manner and not by force and violence.

19. Jury ⚷131(17)

In prosecution for criminal syndicalism, question whether prospective juror believed longshoremen were justified in their dock strike at another city some time ago was incompetent and misleading, especially where strike was not involved in case, and circumstances surrounding it were not made known to juror.

20. Criminal law ⚷1166½(6)

In prosecution for criminal syndicalism, sustaining objection to question whether prospective juror belonged to the Catholic Church was not prejudicial error.

21. Criminal law ⚷422(9)

In prosecution for criminal syndicalism, trial court properly received in evidence a red flag found by officer in cabin occupied by one defendant, together with his suitcase and personal effects, where flag was specifically restricted to case against that defendant, and defendants were not precluded from offering evidence of its meaning.

22. Criminal law ⚷432

In prosecution for criminal syndicalism, Communistic periodical newspaper taken from headquarters of party in which defendants admitted membership was properly received in evidence to affirm undisputed fact that defendants' loyalty was to the red flag.

23. Insurrection and sedition ⚷2

In prosecution for criminal syndicalism, evidence that one defendant stated that a certain social worker should be lynched, that the American flag represented the capitalistic class, and that she would spit upon it, that the only flag was the red flag, and that the United States government should be overthrown by force and violence, was competent to prove defendant's attitude toward Communist principles and her opposition to American political institutions.

24. Criminal law ⚷1036(1), 1044

Defendants in criminal prosecution could not complain of evidence for first time on appeal where it was offered without objection, and no motion was made to strike it out.

25. Criminal law ⚷384

In prosecution for criminal syndicalism, testimony of a former member of the Communist Party relating what he had heard at a Communist Party meeting in 1930, was remote and should have been excluded.

26. Criminal law ⚷670

In prosecution for criminal syndicalism, ruling refusing offers of lengthy documents as a whole, but stating that material portions affecting questions at issue would be admitted, was not an unreasonable restriction of evidence, and denying permission to read entire documents was proper where material portions were not segregated or offered.

27. Criminal law ⚷1170½(6)

In prosecution for criminal syndicalism, an officer's voluntary testimony that one defendant had been rearrested on a charge of vagrancy because she was living with one of the acquitted defendants as husband and wife under assumed names did not constitute reversible error where testimony was stricken, and jury was instructed to disregard it, since appellate court was required to presume that jury complied with court's request.

28. Witnesses 🔑270(2)

In prosecution for criminal syndicalism, where private investigator in employ of state criminal identification division testified that he had left California after being put on the spot, and prosecution admitted that investigator had not been kidnapped as reported in newspaper article, further examination on matter of kidnapping by defense was immaterial and incompetent, and it was not error to restrict cross-examination of investigator.

29. Criminal law 🔑1144(12)

In prosecution for criminal syndicalism, refusing to permit defendants to read portions of documents from which prosecution had been permitted to read portions was not error, where defendants were permitted to read some portions, others were excluded as immaterial, and it did not appear that pertinency of excluded portions was pointed out to court, since appellate court was required to assume that proffered portions were immaterial.

30. Criminal law 🔑1144(12)

To predicate error for excluding unread portions of books and documents in criminal prosecution, record should clearly point out materiality of omitted portions, since every presumption is in favor of regularity and validity of trial court's rulings.

31. Insurrection and sedition 🔑2

In prosecution for criminal syndicalism for advocating confiscation of property and destruction of ordained government by force and violence, evidence relating to attitude of Communist Party toward marriages between white people and Negroes, and relating to religion and churches, contemplating only peaceable changes of the laws in those respects, was properly stricken, and jury was properly directed to disregard evidence.

32. Criminal law 🔑1169(1)

Error in admission of evidence neither tending to prove nor tending to disprove charge is harmless.

33. Criminal law 🔑1144(12)

In prosecution for criminal syndicalism, admitting old Communist documents showing policies of Communist Party was not error where it was not shown that manifesto adopted more recently changed party's policies, since, in absence of proof to the contrary, Appellate Court had to assume that policies remained the same.

34. Criminal law 🔑644

The presence of uniformed officers of the law in courtroom during prosecution for criminal syndicalism was not prejudicial where it did not appear that trial court had anything to do with presence of any officers except regular courtroom officials.

35. Criminal law 🔑644

In prosecution for criminal syndicalism, it was not prejudicial for trial court to permit peace officers to escort a witness whose life had been threatened to and from courtroom, since a court must reasonably protect witnesses while testifying.

36. Evidence 🔑83(1)

Every presumption is in favor of the lawful exercise of duties of public officers.

37. Insurrection and sedition 🔑2

In prosecution for criminal syndicalism, evidence that state officers and institutions are used to unlawfully and violently interfere with peaceful strikes in interest of capitalistic class and against rights of the working class was incompetent.

38. Criminal law 🔑1144(12)

Jurors are presumed to determine guilt or innocence of an accused person solely upon evidence adduced at trial, exclusive of any extraneous matters which may come to their attention.

39. Criminal law 🔑1144(15)

It may not be presumed that an accused person is not accorded a fair and impartial trial merely because prejudicial articles appear in local press during trial, but it must also appear that jurors read those articles, or that contents thereof were brought to their attention.

40. Criminal law 🔑304(1), 1144(15)

Where allegedly prejudicial newspaper articles and editorials published during progress of criminal prosecution were not offered in evidence in support of motions for mistrial, to cite editors for contempt, or for new trial, appellate court could not take judicial notice of their contents, presume that they were read by jurors, or that verdicts were prejudicially affected thereby.

41. Insurrection and sedition ⚿2

In prosecution for criminal syndicalism, instructions drawn on theory that advocacy and use of force and violence by individuals or associations representing majority of citizenry are justifiable when a minority in official control prevents majority from bringing about changes in industrial ownership or control of property or political institutions in a peaceful manner, were properly refused, since they did not constitute correct declarations of law.

42. Criminal law ⚿878(4)

A verdict of not guilty under indictment charging that defendants advocated, taught, aided, or abetted criminal syndicalism by means of written or printed words, by spoken language, or by personal conduct, was irreconcilably inconsistent with and rendered void verdict of guilty under indictment charging that the same defendants organized, managed, and joined associations for the purpose of advocating and teaching criminal syndicalism and conspired to do so, where verdicts were part of same trial and depended upon identical evidence (St.1919, p. 281).

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Pat Chambers and others were convicted of criminal syndicalism, and they appeal from the judgment and from an order denying a new trial.

Judgment and order reversed, and defendants discharged from custody.

Leo Gallagher, of Los Angeles, R. W. Henderson, of Bakersfield, and Grover C. Johnson, of Los Angeles, for appellants.

Pat Chambers, Martin Wilson, Caroline Decker, Albert Hougardy, and Nora Conklin, in pro. per.

U. S. Webb, Atty. Gen., and Lloyd G. Buchler and Wilmer W. Morse, Deputy Attys. Gen., for the People.

PER CURIAM.

The appellants were jointly indicted and convicted of criminal syndicalism contrary to the statutes of California. Stats.1919, p. 281; 3 Deering's Gen.Laws of 1931, Act 8428, p. 4702.

It is contended the act is unconstitutional; that the indictment fails to state a public offense; that the verdict and judgment are not supported by the evidence; that the verdict is inconsistent with another verdict rendered in this case by the same jury at the same time acquitting the appellants of the same charges under a second indictment; that the court erred in receiving and rejecting evidence and in giving and refusing to give certain instructions; and that the trial judge and the prosecuting officers were guilty of prejudicial misconduct which precluded the appellants from receiving a fair and impartial trial.

Seventeen defendants were jointly charged in two indictments with criminal syndicalism and a conspiracy to commit that offense. Both indictments were dismissed as to two of the accused persons. Demurrers were sustained to all except counts IV and VI of the first indictment. Demurrers were overruled as to all other counts of both indictments. The two indictments were consolidated for trial at the request of the defendants. Upon trial all of the defendants were acquitted of the charges contained in the second indictment, numbered 12908. Seven of the defendants were also acquitted of the charges contained in the first indictment, numbered 12889. The remaining eight defendants were convicted of the charges contained in counts IV and VI of the first indictment. From that judgment and the order denying a new trial those eight defendants have appealed.

The fourth count of the first indictment, numbered 12889, charges the defendants with organizing, joining, and managing seven named associations with the purpose of advocating, teaching, aiding, and abetting criminal syndicalism as a means of accomplishing a change in the industrial ownership and control of property and to effect political changes.

Paragraph one of the sixth count of that indictment charges the defendants with conspiring to accomplish changes in the industrial ownership and control of property and of political institutions by means of terrorism, force, violence, sabotage, and by teaching, advocating, aiding, and abetting the destruction of property by means of force and violence. This paragraph also charges them, as a part of that conspiracy, with printing, publishing, circulating, and distributing Communistic literature which advocated criminal syndicalism. The contents of these documents were not quoted, nor were the instruments identified by title or otherwise in that indictment.

Paragraph two of the sixth count of that indictment charges the defendants with a conspiracy to commit criminal syndicalism by organizing, joining, and managing the associations mentioned in the fourth count of the same indictment.

The demurrers to counts IV and VI of indictment number 12889, under which counts the defendants were convicted, were properly overruled. Counts IV and VI of that indictment charge the defendants with the crimes of syndicalism and a conspiracy to commit syndicalism in the language of the statute, with sufficient particularity to conform to sections 950, 951, and 952, of the Penal Code. People v. Malley, 49 Cal. App. 597, 194 P. 48; People v. Whitney, 57 Cal.App. 449, 207 P. 698. The demurrers assert that count IV of the first indictment fails to state a public offense for the reason that it is not specifically alleged what the purposes of the organizations were. This count is not subject to that criticism. Criminal syndicalism is defined by the statute (St.1919, p. 281, § 1) as: "Any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

Section 2, subd. 4, of that act further provides that: "Any person who * * * 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism, * * * is guilty of a felony and punishable by imprisonment in the state prison."

[1] Count IV of the indictment charges the defendants with "criminal syndicalism" committed on the ——— day of June, 1934, in Sacramento county, Cal., in the following language: "Said defendants did then and there wilfully, unlawfully and feloniously organize and assist in organizing, and they are and each of them is and each of them knowingly became a member of an organization, society, group and assemblage of persons known and designated as 'Sacramento Workers School', 'Patrick Henry Club', 'Young Communist League', 'Unemployed Counsel', 'Communist Party', 'Agricultural', 'The C. & A. W. I. U.', otherwise known and called 'The Cannery & Agricultural Workers Industrial Union', said * * * (organizations) are each and all identical in aims and purposes and have the same objectives and are controlled, dominated, and actively directed by the same persons and officers, to wit: the above named defendants, * * * and all of said organizations, societies and groups were and each of them was organized and assembled to organize, teach, aid, and abet Criminal Syndicalism as a means of accomplishing a change in industrial ownership and control [of property] and effecting political changes."

The preceding language specifically charges the appellants with organizing and knowingly becoming members of the designated associations created by them to teach, aid, and abet criminal syndicalism as defined by the statute. This is a sufficient compliance with the statute and the demurrers to that count were properly overruled.

[2] The demurrers to count VI of the first indictment were presented on the ground that it omits to specify the details of the plan by means of which the defendants are accused of conspiring to commit criminal syndicalism, and also that it fails to identify the pamphlets, books, and documents advocating syndicalism, which they are charged with circulating.

This attack upon count VI of the indictment is also without merit. It is specifically alleged, as may be observed by reference to the portion of that count above quoted, that the means of accomplishing the prohibited changes in the industrial ownership and control of property and of political changes were the use of terrorism, force and violence, sabotage, strikes, and boycotts, and by teaching, advocating, aiding, and abetting those unlawful methods of accomplishing their alleged purpose, and by printing, circulating, and distributing books, pamphlets and documents advocating crime, sabotage, and malicious damage to property by force and violence. These allegations are definite and specific. They adequately conform to the requirements of the statute.

It is true that the books, documents, and pamphlets advocating syndicalism, which they are charged with printing, circulating, and distributing, are not specifically identified in the indictment. It is unquestionably the better practice to identify in the indictment in some manner the documents relied upon as a necessary element of the criminal charge. But it appears there were thirty-two of them, consisting of hundreds of pages. They are extremely lengthy. No useful purpose would be subserved by quoting them in the indictment. The nature of these documents is alleged. Their contents were well known to each of the appellants. They appertain to the Communist plan of destroying the ordained form of government by force and violence, and to the confiscation of property without legal process or compensation. It has been held that it is unnecessary to specifically enumerate or incorporate documents in an indictment under such circumstances. People v. Malley, supra. Count VI of the indictment therefore sufficiently states a public offense, and the demurrers thereto were properly overruled.

The second indictment numbered 12908 charged the appellants with criminal syndicalism on the ——— day of June, 1934, alleging the defendants did by the use of "spoken and written words and personal conduct advocate, teach, aid and abet" crime, sabotage, violence, and unlawful means of procuring changes in industrial ownership and control of property and changes in political government. This indictment also charged them with criminal syndicalism by unlawfully publishing, distributing and circulating thirty-two separate books, pamphlets, and documents which are identified and designated by reference to their printed titles and the subject matter contained therein.

Since the appellants were acquitted by the jury of all of the charges contained in this second indictment, we shall later consider the inconsistent effect of those two verdicts.

[3] The California Syndicalism Act is not unconstitutional. It does not violate the Fourteenth Amendment of the Constitution of the United States. Whitney v. People of State of California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; People v. McClennegen, 195 Cal. 445, 468, 234 P. 91. The constitutionality of the California Syndicalism Act is approved in the late case of Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 733, 81 L.Ed. 1066.

The cases of De Jonge v. Oregon, 299 U. S. 353, 57 S.Ct. 255, 258, 81 L.Ed. 278, and Herndon v. Lowry, supra, are not in conflict with the validity of the Criminal Syndicalism Act of California. In the De Jonge Case there were no overt acts or conduct of the defendant to sustain the conviction of a violation of the Oregon Syndicalism Act. In that case the United States Supreme Court approved the validity of the California Syndicalism Act as it was applied in the Whitney Case. All that the record shows De Jonge did was to attend a public meeting in Portland, held under the auspices of the Communist Party, 90 per cent. of the audience being persons who were not Communists. The meeting was for the purpose of protesting against interference with a dock strike. He did not advocate force or violence against the state authorities. He was not charged with membership in the Communist Party, nor does it appear that the unlawful principles of the Communist Party were discussed or advocated at that meeting. The appellant in that case was merely charged with assisting in conducting a meeting called under the auspices of the Communist Party. The meeting was public and orderly and it was held for the lawful purpose of protesting against dock strike conditions and hiring-hall raids. There were 300 individuals present. Only 10 per cent. of them were Communists. Neither criminal syndicalism nor other unlawful conduct was advocated by the appellant in that case or by anyone else at that meeting. The court said: "The words of the indictment that 'said assemblage of persons, organization, society, and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage,' referred not to the meeting in question, or to anything then and there said or done by defendant or others," but only to the conduct of the Communist Party.

The court further said:

"He [the defendant] was not indicted for participating in its [the Communist Party] organization, or for joining it, or for soliciting members or for distributing its literature. He was not charged with teaching or advocating criminal syndicalism or sabotage or any unlawful acts, either at the meeting or elsewhere. * * *

"His sole offense as charged, and for which he was convicted * * * was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party."

The court then concluded that: "While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly," as was shown in the De Jonge Case.

In the De Jonge Case the court approved the constitutionality of the California Syndicalism Act as it was applied in the Whitney Case. The judgment was reversed solely because of a lack of evidence to support the indictment.

In the Herndon Case a negro was indicted for insurrection contrary to section 56 of the Georgia Penal Code 1910 (Code 1933, § 26-902) by "calling and attending public assemblies and by making speeches for the purpose of organizing and establishing groups and combinations of white and colored persons under the name of the Communist Party of Atlanta for the purpose of uniting, combining, and conspiring to incite riots to embarrass and impede the orderly processes of the courts and offering combined resistance to, and, by force and violence, overthrowing and defeating the authority of the state; that by speech and persuasion, the appellant solicited and attempted to solicit persons to join * * * and become members of the Communist Party * * * and introduced into the state and circulated * * * booklets, papers, and other writings with the same intent and purpose."

When Herndon was arrested he had in his room and on his person certain Communist documents. The court said:

"There was no evidence that he had distributed any of the material carried on his person and found in his room, or had taken any of it to meetings. * * *

"The two circulars, admittedly distributed by the appellant, had nothing to do with the Communist Party."

The documents found in his possession refer merely to a party which is "the vanguard of the working class," etc. None of them advocated insurrection or the use of force or violence to confiscate property or to overturn the American form of government. The court said: "There is no evidence the appellant distributed any writings or printed matter found in the box he carried when arrested, or any other advocating forcible subversion of governmental authority. There is no evidence the appellant advocated, by speech or written word, at meetings or elsewhere, any doctrine or action implying such forcible subversion."

It was there held it must appear the acts, conduct, and utterances charged contemplate force or violence to upset the form of government. The court further stated that the intent to incite insurrection must furnish a "clear and present danger," not immediately, but within a reasonable time, to obstruct the law, and must be determined or inferred "from the time, place, and circumstances of the act." The court then said:

"The only prohibition [of a valid statute] he is said to have violated is that of section 56 forbidding incitement or attempted incitement to insurrection by violence. If the evidence fails to show that he did so incite, then, as applied to him, the statute unreasonably limits freedom of speech and freedom of assembly and violates the Fourteenth Amendment. We are of opinion that the requisite proof is lacking. * * * It is apparent that the documents found upon the appellant's person were certainly * * * innocent and consistent with peaceful action for a change in the laws or the Constitution. The proof wholly fails to show that the appellant had read these documents; that he had distributed any of them; that he believed and advocated any or all of the principles and aims set forth in them, or that those he had procured to become members of the party knew or approved of any of these documents. * * *

"In its application the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of that party when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to any one by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government."

It is held in the Herndon Case that the evidence fails to show that he possessed literature which advocated violence, that he knew the contents of the documents which he possessed, or that he made known the contents of those documents to others. It was definitely held that the evidence failed to prove that the accused person had in his possession literature advocating violence, or that he held meetings "for the purpose of inciting insurrection." The court said: "The question is not whether Georgia might, in analogy to what other states have done, so declare."

In a dissenting opinion which was filed in the Herndon Case, in which four justices concurred, it was said: "That the constitutional guaranty of freedom of speech and assembly does not shield or afford protection for acts of intentional incitement to forcible resistance to the lawful authority of a state is settled by repeated decisions of this Court."

In support of the preceding statement, the following authorities are cited: Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 631, 69 L.Ed. 1138, 1145; Whitney v. California, 274 U.S. 357, 371, 47 S.Ct. 641, 71 L. Ed. 1095, 1104; Fiske v. Kansas, 274 U.S. 380, 385, 47 S.Ct. 655, 71 L.Ed. 1108, 1111; Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117, 1122, 73 A.L.R. 1484; Near v. Minnesota, 283 U.S. 697, 708, 51 S.Ct. 625, 75 L.Ed. 1357, 1363.

The Herndon Case was reversed solely for lack of evidence to sustain the charge of insurrection. Both the statute and the proof in the present case differ vitally from the Herndon Case.

It is insisted the judgment in this case should be reversed pursuant to the principle announced in the Herndon Case, supra, that it does not appear from the evidence there is a "clear and present danger" of a change in industrial ownership or control of property or of the form of political government as a result of the alleged advocating and exercise of force and violence on the part of the appellants for that purpose. It is also asserted the appellants were prohibited from introducing evidence to prove that no such present danger existed. With respect to the insufficiency of the evidence the Herndon Case holds that the intent to incite insurrection must furnish a "clear and present danger," not immediately, but within a reasonable time, to obstruct the law and that it must be determined or inferred "from the time, place, and circumstances of the act."

[4, 5] It will be observed the Supreme Court does not hold there must be a present danger of the existence of actual insurrection. It is there said there must be evidence of a present danger of activity to obstruct the law with the intention of inciting insurrection. It was held in that case there was a total absence of proof of overt acts in violation of the insurrection law. No incendiary literature was possessed or circulated by the defendant. He was held not to have advocated the doctrine of Communism. The Georgia statute does not make mere membership in an organization which advocates force and violence a crime. In the present case there is evidence of a present danger of violating the law. The evidence tends to show that the appellants actually organized associations for the purpose of syndicalism; and that they taught and advocated the principles of Communism by distributing its literature and by otherwise aiding, abetting, and encouraging others to resort to intimidation, force, and violence to confiscate property and destroy ordained government. There is evidence that they did participate in strikes in which force and violence were used. The court may take judicial knowledge of the fact that the land is filled with labor disturbances, and that sit-down strikes and other forms of strikes have recently occurred in California and elsewhere, in which force, violence, unlawful practices, and deaths have occurred. There is substantial evidence of overt acts on the part of the appellants to violate the Syndicalism Act. These acts and conduct furnish evidence of a present danger. It was the province of the jury to determine from the evidence adduced whether there was a present danger of unlawful confiscation of property or political changes on account of the appellants' activity. With that province of the jury we may not interfere.

[6] It is no defense to a charge of criminal syndicalism against those who actually organize associations for that purpose, and who teach, advocate, aid, encourage, and abet the confiscation of property and the destruction of government by intimidation, force, and violence, that they failed to actually incite revolution because they lacked sufficient votes or physical force to accomplish their purpose.

[7-9] It would be unreasonable to hold that overt acts which were intended to accomplish syndicalism, or a conspiracy to commit syndicalism, do not constitute a violation of the statute merely because private property was not actually confiscated or the government destroyed. Certainly the law may presume from such overt acts as occurred in this case that the appellants intended to and actually did attempt to carry out their avowed policy of confiscating property and destroying the institutions of government by force and violence. Established law justifies one in the use of necessary means of protecting himself or his property against unlawful force and violence, when he has reasonable cause to believe such force is about to be exercised. The state has a right to protect its citizens

against threatened unlawful interference with their persons or property. It is said in the Gitlow Case, supra, in that regard: "It [the State] cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

[10] Our attention is not called to the rejecting of any material evidence tending to show that the conduct of the appellants did not furnish a present danger of their violation of the Syndicalism Act. The nature of the proffered evidence was not indicated. In the absence of such showing we must assume that such excluded evidence, if any, was merely cumulative, and not prejudicial.

The appellants were not unduly restricted in their examination of prospective jurors on their voir dire. At least no prejudicial error on that account appears of record. Twenty assignments of error are relied upon. We find no substantial merit in these assignments. The impaneling of the jury consumed nearly a month. An unusually large number of jurors were examined very completely. The appellants appear to have been granted reasonable latitude in their cross-examination of these prospective jurors. They did exhaust all their peremptory challenges, and additional challenges were granted to them. They did object to the trial of the cause by the jury which was finally sworn. Not one of the prospective jurors, the limitations of whose examinations were criticized, was sworn to try the cause. Each of these challenged jurors was excused either by agreement, for cause, or upon peremptory challenges. Some of them were excused by the prosecution. Our attention is not called to any evidence indicating that the appellants or any of them were compelled to or did exercise challenges for cause or peremptory challenges to any of these prospective jurors. Under such circumstances we are unable to hold as a matter of law that the appellants were prejudiced by the sustaining of objections to these propounded questions.

It has been said that, while it is true that a reasonable latitude should be granted by the court in the examination of jurors on their voir dire with the object of ascertaining their state of mind with relation to the presence or absence of bias and prejudice, it is not only the privilege, but it is the duty of the court, to restrict the examination of prospective jurors within reasonable bounds so as to expedite the trial. People v. Semone, 140 Cal.App. 318, 326, 35 P.(2d) 379.

Many of these questions related to an asserted right to resort to force and violence to resist organized authority upon the remote and improbable contingency that the form of the American government may some day become a dictatorship foisted upon the People against their will by a controlling minority capitalistic class. These questions involve an implied claim of right to organize private groups of individuals to advocate and participate in the unlawful use of force and violence to suppress what amounts to insurrection.

[11-13] These questions are not based upon issues which are involved in this case or upon the application of any practical lawful theory thereof. We must assume that unlawful usurpation of governmental authority or control of property by unauthorized minority classes will be restored to the proper officers by operation of law and not by insurrections. The legal procedure for determining the right to a public office is by means of the writ of quo warranto. Both Federal and State Constitutions prohibit the taking of private property without process of law, and then only upon payment of just compensation therefor. The documents of the Communists advocate confiscation of property without compensation and destruction of the government by force and violence. They assert the right of individuals and organizations to enforce by violence the will of the majority against a minority in power if the latter refuse to accede to the demands of the former. That is not lawful conduct. The doctrine of a democracy is that the majority shall control, but that the minority is still entitled to representation and to the protection of the law. The executive and legislative branches of both federal and state governments are the only authorities vested with the lawful power to quell insurrections. Private persons and organizations have no such vested right. Organizing an association to advocate the use of force and violence to confiscate property and to destroy the government is akin to insurrection, which is prohibited by the Syndicalism Act of California.

[14-18] The appellants may not complain of being restricted in their examination of prospective jurors by the refusal to entertain questions based upon the assumption that the constitutional guaranty of freedom of speech entitles one to publicly criticize the form of government or its officers and to advocate a change of property rights and governmental principles by unlawful means. The theory of these questions was that under the doctrine of the freedom of speech the California Syndicalism Act is necessarily void. It is true that laws should not infringe upon our guaranteed freedom of speech and lawful assembly. Independence of thought and freedom of speech should be encouraged in the interest of ascertaining the truth. The truth will never suffer from honest speech. But great harm may result from willful, reckless, or ignorant distortion of the facts. Unrestrained acts and utterances may result in the destruction of one's reputation or his property. The primary purpose of government is to protect persons, property, and lawful privileges of its citizens. The spreading of false propaganda is the curse of the age. There is a clear distinction between freedom of speech and an unrestrained license to recklessly or willfully say anything one pleases without regard to the truth. In the guise of freedom of speech one may not be permitted to whisper away the good reputation or character of another person, or destroy his business or property by false rumors. Such malicious conduct may be punished as libelous. Freedom of speech does not permit one to encourage, aid, or abet the commission of a crime by another. Our statutes punish such individuals as principals in the transaction. Both federal and state laws prohibit individuals from conspiring to confiscate property or to destroy government. Both federal and state authorities may be used to suppress insurrection. Freedom of speech must be exercised with due regard to the personal and property rights of others. There can be no freedom of speech except such as exists pursuant to law. The chief issue in the propounding of these challenged questions and throughout the trial is whether government by threatened intimidation, force, and violence shall prevail over ordained government under and pursuant to established law. In a democracy the statutory law is the voice of the People and should be upheld even against the majority. If a statute is not in accordance with the approval of the majority, it should be changed in a lawful manner and not by force and violence. The appellants accept the doctrines of the Communist Party and characterize the American government as "capitalistic and bourgeoisie." Some of the revolutionary policies advocated by the Communistic literature which was received in evidence are illustrated by the following quotation: "Only a violent defeat of the bourgeoisie, the confiscation of its property, the annihilation of the entire bourgeoisie governmental apparatus, * * * judicial, military, bureaucratic, administrative, municipal, etc. * * * Only when the dictatorship of the workers has deprived the bourgeoisie of such powerful weapons as the press, the school, * * * the church, the government apparatus, * * *" may we succeed.

This seizing of property and the overturning of government is not to be accomplished by the peaceable means of the ballot, but by intimidation, force, and violence. It is boldly declared that "a combination of lawful and unlawful work is absolutely necessary. * * * Communists are believers in force * * * our belief is in revolutionary force. * * * The overthrow of capitalism is impossible without force, without armed uprising and proletarian wars against the bourgeoisie."

Questions based upon such unlawful means of acquiring property and destroying ordained government are incompetent. The courts of this land recognize only lawful means of acquiring property or changing the form of government. The objections to such questions were properly sustained. Abraham Lincoln, the great commoner of America, who was so anxious to preserve this Union, said with respect to such unlawful conduct: "Let not him who is houseless pull down the house of another, but let him work diligently to build one for himself, thus by example insuring that his own shall be safe from violence when built."

[19] It was not prejudicial error for the court to sustain an objection to the question asked of the prospective juror as to whether she believed the longshoremen were justified in their dock strike at San Francisco some time ago. That strike was not involved in this case, and the circumstances surrounding it were not made known to the juror. In determining the merits of a strike it is important to consider the circumstances attending it.

Peaceable strikes, picketing of men and mass-bargaining are recognized as lawful and valid. But undue interference with the ownership, control, and use of private property and efforts to control property or secure benefits by coercion, intimidation, force, or violence are clearly unlawful. Property rights or advantages gained by such unlawful and oppressive means are uniformly regarded as invalid. The question which was propounded to the juror with respect to the San Francisco strike was incompetent and misleading.

[20] Nor was it prejudicial error to sustain the objection to the question asked of Mrs. Lagomarsino: "Do you belong to the Catholic Church?" If the juror be a member of that church, we may not presume she was therefore prejudiced against or opposed to lawful means of securing rights or demands of labor organizations. Her church affiliation was not involved in this proceeding, and the objection to the question was properly sustained.

We have carefully reviewed each assignment of error of the nature complained of and find no undue restriction of the appellants' right to reasonably examine the jurors.

There is evidence indicating that the appellants were members of the Communist Party and that they were engaged in strikes, parades, and labor activities of that organization which organization issued, printed, and distributed literature advocating force and violence to procure a change in the ownership and control of property and to destroy ordained governmental institutions. These documents were procured at the Communist Party headquarters in Sacramento, which was frequented by the appellants. There is evidence to indicate that the appellants organized, joined, and managed auxiliary associations to advance the cause of Communism. That conduct was clearly in contravention of the provisions of the California Criminal Syndicalism Act. There is also evidence that the appellants participated in agricultural strikes where force and violence were used, although it may be true that the evidence fails to show that they personally instigated them or exercised force and violence therein. There is evidence that these auxiliary associations also taught the same unlawful use of force and violence which is advocated by the Communist Party, including the procuring of changes in the ownership and control of industrial property, and affecting political principles of government. Regarding the necessary elements constituting the several crimes with which the appellants are charged, it may be said that the evidence is conflicting.

Numerous books, pamphlets, and documents were seized at the Communist headquarters in Sacramento which was frequented by the appellants. It was conceded that the appellants were members of the Communist Party; that they believed in and advocated those principles. These documents were offered by the prosecution and received in evidence. They announce and advocate unlawful means of confiscating private property without compensation and of destroying the institutions of ordained government. Brief excerpts from those documents read as follows:

(Exhibit No. 4. Manifesto of the Communist Party.) "* * * The Communists everywhere support every revolutionary movement against the existing social and political order of things. * * * The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution."

(Exhibit No. 5. Thirteenth Plenum.) "* * * There is no way out of the general crisis of capitalism other than the one shown by the October revolution, via the overthrow of the exploiting classes by the proletariat, the confiscation of the banks, of the factories, the mines, transport, houses, the stocks and goods of the capitalists, the lands of the landlords, the church and the crown. * * *

"The Communist Party must raise before the toilers in the United States the revolutionary way out of the crisis. All members of the Party must in their day-to-day work, in the fight for the demands of the workers, point out convincingly and insistently that only the destruction of the capitalist system, the establishment of a revolutionary workers' government, of the Soviet power, can free the millions of toilers."

(Exhibit No. 25. Programme of the Young Communist International.) "The ultimate aim of the C. I. and Y. C. I. is world Communism. * * * The Communists publicly declare that, in order to overthrow the capitalist system and establish the proletarian dictatorship, the armed uprising of the proletariat is necessary."

(Exhibit No. 27. Foster and Ford for Food and Freedom.) "* * * It is the aim of the Communist Party * * * to confiscate without remuneration the great industries and the big land holdings from the parasitic class who now own them. * * * The Communist Party of the United States is a section of the world Party of Lenin, the Communist International. It is a brother Party of the great Russian Communist Party which blazed the way for the world revolution and is now carrying through the Five-Year Plan victoriously."

(Exhibit No. 33. Workers of the World Unite. Statutes, Thesis and Conditions of Admission to the Communist International.) "The Communist International makes its aim to put up an armed struggle for the overthrow of the International bourgeoisie * * * and the complete abolition of the State; * * * the establishment of the dictatorship of the proletariat and of the International Soviet Republic. * * * Only a violent defeat of the bourgeoisie, the confiscation of its property, the annihilation of the entire bourgeoisie governmental apparatus, parliamentary, judicial, military, bureaucratic, administrative, municipal, etc., even the individual exile or internment of the most stubborn and dangerous exploiters. * * * It [the Communist Party] makes the struggle especially broad, acute, and pitiless. * * * The Communists are unable to carry on their work lawfully, a combination of lawful and unlawful work is absolutely necessary. * * * Refusal to carry on or participate in such work should be considered equal to treason to the revolutionary cause. * * * The Communist parties * * * should also by legal or illegal means carry on a propaganda amongst the troops sent against the workers. * * * Only when the dictatorship of the workers has deprived the bourgeoisie of such powerful weapons as the press, the school, parliament, the church, the government apparatus, * * * [will it succeed]. * * * The working class cannot achieve the victory over the bourgeoisie by means of the general strike alone, and by the policy of folded arms. The proletariat must resort to an armed uprising."

(Exhibit No. 35. A. B. C. of Communism.) "As the chief power of the State lies in the army, it is necessary, above all things to undermine and destroy the army. * * * To say that the revolution can be achieved without civil war is to say that a 'peaceful' revolution is possible. * * * As well believe that a tiger can be coaxed into feeding on grass and allowing calves to live in peace. * * * Its every act shows that it walks in the footsteps of Marx, that is, on the revolutionary pathway that leads to the forcible overthrow of the capitalist system of society."

(Exhibit No. 36. Program of the Communists.) "By what means is the Communist world order to be established? How are we to attain it? The answer * * * is: Through dictatorship. * * * Dictatorship means a power as strong as iron, a power which gives no quarter to its enemies, * * * which abolishes the landowners and capitalists. * * * We Communists, therefore, stand for a workers' government until the workers have gained complete control over their adversaries; until they have crushed the entire employing class and knocked out its pride, and until the employing class itself has given up all hopes of ever coming into power. * * * Then you Communists are believers in force? We shall answer: Most certainly; but our belief is in revolutionary force. We are convinced that by soft words the working class will gain nothing. * * * Nothing short of a revolution will overthrow capitalism and destroy the bourgeois State. * * * Every revolution means using force against the former dominators. * * * If the bourgeoisie sends whole regiments against us, and we have the means to form regiments of the same kind, we should be the greatest fools if we did not exert all our powers to organize, drill and educate such revolutionary red regiments. * * * The bourgeoisie is building up a colossal, an enormous fleet, a fleet of submarines, a sea and air fleet, insanely large armies are being formed; supernatural fortifications are being built; gigantic cannons and such means of destruction as armored automobiles and tanks. This entire fearful system of force must be destroyed. * * * That is the program of the Communist Party."

(Exhibit No. 37. The Struggle Against Imperialist War and the Tasks of the Communists.) "But the overthrow of capitalism is impossible without force, without armed uprising and proletarian wars against the bourgeoisie."

These documents clearly contain numerous seditious and incendiary utterances which are revolutionary in character. They advocate a proletarian dictatorship maintained by force and violence as contrasted with a government pursuant to law. They boldly assert that the Communists intend to confiscate private property without process of law or compensation. Article 4, § 2, of the Federal Constitution assures all American citizens the right to hold and control real and personal property. Both the Federal and State Constitutions (Const.U.S. Amends. 5, 14; Const.Cal. art. 1, §§ 13, 14) prohibit the taking of private property without due process of law and only upon the payment of just compensation therefor. The Communist policy denies these rights. It defies law and threatens armed revolution.

The surprising spectacle was presented at the hearing of this case when certain appellants asserted they could expect no justice at the hands of this court for the reason that its members were prejudiced against the principles of the Communist Party to which the appellants belonged, forgetting that each member of every judicial branch of our government, and every other public officer elected by any party, is required to solemnly swear he will support the Constitution of the United States and uphold the law of the land in order to qualify him to hold such office.

In the case of Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 630, 69 L.Ed. 1138, at page 1146, the Supreme Court of the United States said: "A State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence and other unlawful means."

The California Syndicalism Act has sought to preserve its political institutions by penalizing acts and conduct which tend to destroy our government. It would be a sad commentary on our vaunted democratic system of government if the state were powerless to punish open insurrection, unlawful confiscation of property or avowed efforts to destroy our political institutions by means of force and violence.

Six separate assignments of errors with respect to the introduction of oral and documentary evidence are urged by the appellants. We are of the opinion none of them constitutes reversible error.

[21] The court properly received in evidence a red flag which was found by an officer, together with a suitcase and personal effects belonging to the defendant Albert Hougardy, in a cabin occupied by him in Yolo county. Red flags were seen in the possession of the defendants Nora Conklin and Lorene Norman, who carried them in a Communists' May Day parade in Sacramento. A red flag was also found in the Communist headquarters at 912½ Eighth street in Sacramento. The evidence as to the flag was specifically restricted by the court to the case against Hougardy. It was received as tending to show "some evidence connecting the defendant Hougardy with the [Communist] organization." In 3 Century Dictionary and Cyclopedia, p. 2247, it is said the red flag is "association with blood or danger. * * * The recognized standard or symbol of an extreme revolutionary party, or of those who seek social as well as political revolution and anarchy; as, the red flag of the Commune." It is the emblem of the Russian Communists. Mr. Gallagher, attorney for some of the defendants, stated that the red flag "stands for any organization or society where the means of production are owned publicly, and operated for use, and not for profit; that it stands as a symbol of the teachings of Karl Marx and Engels; of Lenin and Stalin, the Communist International." The defendants were not precluded from offering evidence of its meaning. They were merely prevented from offering in evidence entire pamphlets issued by the Communist Party without first exhibiting them to the court for inspection. The trial judge said in that regard: "The court will not permit it without having an opportunity to go over it and find out what the court shall consider relevant to the issue." The offer was then abandoned by the defendants.

[22] The "Western Worker," a Communistic periodical newspaper, under date of January 22, 1934, was taken from the Communist headquarters at Sacramento with the other documents and books. It was received in evidence for the purpose of reading therefrom an excerpt in which a Communist declared that, "This flag [referring to the American flag] is not our flag. Our flag is the red flag." This merely furnished some evidence of the political principles of Communism to which the appellants adhere. It was one of the documents taken from the headquarters of the party to which they admit membership. It merely tended to affirm, what has not been

denied, that their loyalty was to the red flag. That fact is not disputed.

[23, 24] Melville Harris, a member of the Communist Party in Sacramento, testified without objection that Nora Conklin, one of the appellants, said Mary Judge, in charge of social welfare in Sacramento County, should be taken out and lynched; that the American flag represented the capitalistic class, and that she (Nora Conklin) would spit upon it; that the only flag was the red flag; and that the United States government should be overthrown by force and violence. This evidence was competent to prove the attitude of Nora Conklin toward Communist principles and her opposition to American political institutions. It was offered without objection. No motion was made to strike it out. The appellants may not complain of this evidence for the first time on appeal.

[25] Carl Abbott, a police officer of Los Angeles, and a former member of the Communist Party, testified over the objection of the appellants, that he attended a Communist Party meeting in Los Angeles in March, 1930, and heard a Communist speaker say that "after the revolution" the capitalists would be stood up against a wall and shot, and other similar incendiary remarks. This evidence is remote. It should have been excluded.

[26] The appellants complain because they were not permitted to read to the jury entire lengthy Communistic documents to refute the preceding evidence of Mr. Abbott, and to show the real attitude of the Communist Party toward women. In the interest of expediting the trial and to prevent the encumbering of the record by the admission of immaterial matter, the court refused these offers as a whole, but said that material portions thereof affecting the questions at issue would be admitted. Such material portions of the documents were not segregated or offered. This was not an unreasonable restriction of evidence.

[27] For the purpose of tracing a copy of the "Program of the Communist Party" to the possession of the defendant Caroline Decker, which document was received in evidence, Ray Kunz, an officer, in response to the question "Will you explain why you re-arrested her (Caroline Decker) at that time," replied "She was living with Jack Warnich [one of the acquitted defendants] under the name of Mr. and Mrs. John Stewart, or, Jack Stewart, 1127 U Street; I arrested them both and charged them with vagrancy." Upon motion this evidence was stricken from the record and the jury was directed to disregard it. It does not appear this answer was solicited by the prosecution. It was volunteered by the witness. It was, of course, improper. A fair inference from a reading of the entire record upon that subject leads us as to the conclusion that the prosecution merely sought to connect the defendant Decker with possession of the Communistic document, which was identified and received in evidence. The prosecution disavowed a purpose of eliciting that incompetent evidence. At least, it was stricken from the record, and the jury was instructed to disregard it. We must presume the jury complied with that request of the court. It does not constitute reversible error under the circumstances of this case.

Forty-one assignments of alleged errors are cited by the appellants in sustaining objections to questions propounded by them on cross-examination of several witnesses. It is strenuously urged the appellants were unduly restricted in their cross-examination of certain witnesses, among whom were Hanks, Harris, Abbott, Carpenter, and others. We have carefully examined each assignment and have read much of the original record with relation thereto. The cross-examination of the three witnesses, the limitation of which is chiefly criticized, consumed several hundred pages each. We are of the opinion the court was very patient, and liberal in allowing the appellants great latitude in cross-examination of witnesses. There is no substantial merit in any of these assignments of error. It will be observed that the trial consumed about three months' time, and there are nearly seven thousand pages of evidence.

[28] The chief critcism is made of the limitation of the cross-examination of William Hanks, which consumes some two or three hundred pages. He was a private investigator in the employ of the criminal identification division of the state of California. He was an investigator for the United States government during the period of the World War. He had previously been an investigator in California and elsewhere in I. W. W. disturbances, and regarding several strikes. He joined the Communist Party in Sacramento and frequently visited their headquarters and attended Communist meetings, procuring from them much of the Communist literature which

was received in evidence. He made daily reports of their activities to the identification division. He had testified before the grand jury which returned the indictments in this case. He knew that the Communists were suspicious of him. There was then a general gathering of Communists in Sacramento. He stated that after testifying before the grand jury he was approached at night near an alley by an unknown man who shoved a revolver in his back and told him he had "gone to the Court House once too often"; that he was "on the spot" and unless he left town immediately he would get shot. He agreed to leave Sacramento, admitting that he was afraid of losing his life. He left that night on a bus and visited relatives in Wisconsin. He did not inform the district attorney when he left, but afterwards wired him. When his absence was discovered, a Sacramento newspaper printed an article declaring that Hanks had been kidnaped. He was brought back for the trial. Believing that the district attorney had inspired this story of the purported kidnaping, the appellants zealously cross-examined Mr. Hanks on that subject. He declared that he had not been kidnaped. He denied that he ever told anyone he had been kidnaped. He insisted that he had been "put on the spot" and that his life was threatened by an unknown man. He said he did not know who the man was. He said he did not know whether the man was a Communist. The subject of this episode was pursued by the appellants on cross-examination at considerable length. They sought to connect the newspaper article with the district attorney, but failed. They attempted to elicit conversations regarding the matter with the Eastern people and others. They asked numerous questions for the purpose of disproving the newspaper article regarding the kidnaping. Many of the questions were repetitions of former ones. Objections to further pursue the subject of the kidnaping article were sustained. It was freely admitted by the witness and the prosecuting attorney that Hanks had not been kidnaped. Further examination along that line was immaterial, useless, and incompetent. There was no error in finally restricting the cross-examination upon that or any of these other subjects of which the appellants complain.

[29, 30] There are forty-one assignments of alleged errors in receiving and rejecting certain documentary evidence. It is contended the appellants were prejudiced by permitting the prosecution to read to the jury portions only of the books, pamphlets, and documents procured from the Communist headquarters, and that they were precluded from reading to the jury other portions of the same documents. There was no error in these rulings under the circumstances of this case. The court did not preclude the reading of specific designated portions of those documents. The judge repeatedly said that any other material portions of those documents could be subsequently read to the jury by the appellants. Many of them were later read to the jury. Some of them were excluded as immaterial. The court said in that regard: "Unless you can specify what is pertinent I will rule against you." It does not appear that the pertinency of excluded portions of those books, pamphlets, and documents was pointed out to the court. Under such circumstances the appellants may not now complain of the rulings in that regard.

We must assume these proffered portions were immaterial. It is difficult for us to understand how any other declarations of the Communist documents which were received in evidence could reasonably explain the unlawful methods advocated by them in the paragraphs which were read to the jury by the prosecution, some of which are heretofore quoted in this opinion. We are of the opinion no reversible error appears with respect to these assignments. To predicate error for excluding unread portions of books and documents, the record should clearly point out the materiality of the omitted parts. Otherwise we are unable to determine the merit of such assignments. Every presumption is in favor of the regularity and validity of the rulings of the court.

[31, 32] The appellants also assign forty other alleged errors in receiving in evidence what is termed irrelevant matter, some of which was stricken from the record on motion of the appellants and the jury was directed to disregard it. In most instances the appellants have failed to direct our attention to the record of the challenged evidence which they contend was irrelevant. The evidence which was received with relation to the attitude of the Communist Party toward marriages between white people and Negroes, and with relation to religion and the churches, contemplated only peaceable changes of the laws in those respects; they had nothing to do with advocating the confiscation of

property and the destruction of ordained government by force and violence. Those matters were properly stricken from the record and the jury was directed to disregard them. A multitude of cases hold that error in the admission of evidence which neither tends to prove or disprove the charge under consideration is harmless. 8 Cal.Jur. 615, § 599. There is no reversible error in these assignments.

[33] Nor did the court err in admitting in evidence the so-called "ancient Communist documents." They were procured from the Communist headquarters and were sold and distributed as authentic. They were received in evidence for the purpose of showing the unlawful principles of the Communist Party advocating the confiscation of property and the destruction of ordained government by force and violence. It is true that portions of the old "Communist Manifesto," dated in 1848, and of another similar document dated in 1888, were read in evidence. It is now contended the principles and program of that organization were definitely fixed and determined at the Communist Industrial Congress which convened in 1928, and that all former declarations of its principles are obsolete and inaccurate. But it does not appear that the Communist Manifesto which was adopted by the Industrial Congress in 1928, or any other subsequent declaration of principles, changed its original policy of advocating force and violence to confiscate property or to destroy government. In the absence of proof to the contrary, we must assume the principles of the Communist Party remain the same with respect to the issues of this case as they existed in 1848 and in 1888. These challenged documents were properly received in evidence.

[34, 35] Error is charged in "permitting the courtroom to take on the air of an armed camp." It is contended the appellants were prejudiced by the presence in the courtroom of uniformed officers of the law, and by permitting officers to escort the prosecution's witness, Hanks, to and from the courtroom. It does not appear the courtroom was "packed with uniformed officers." Our attention is called to no such evidence. It is the duty of a court to reasonably protect witnesses while they are engaged in testifying in a cause in court. It will be recalled that Mr. Hanks testified that his life had been threatened by a gunman, and that he was forced to leave the city on that account. Certainly it is not prejudicial for the court to permit peace officers to escort such a threatened witness to and from the courtroom. Moreover, it does not appear the court had anything to do with the presence of any officers except the regular courtroom officials. There is no error in that regard.

[36, 37] Mr. Gallagher, in his brief, asserts that the appellants desire to prove a "direct tie-up between the State apparatus and the vigilantes,—to show that the theory of the Communist Party (is) that the State apparatus is to break strikes; that the State apparatus is used as an instrument of force to protect the interests of the capitalist class at the expense of the working class." Such evidence is visionary and incompetent. It would be immaterial even though the Communists believed it to be true, for it would not then justify the use of force and violence on the part of individuals or organizations to defy duly elected officers of the law or to destroy the government. Every presumption is in favor of the lawful exercise of the duties of public officers. The theory that state officers and institutions are secretly procured contrary to their oaths and avowed purposes to unlawfully and violently interfere with peaceful strikes in the interest of the capitalistic class and against the rights of the working class is erroneous and fanciful. That extravagant theory is the creation of a prejudiced mind. It is not susceptible of proof. There was no error in refusing to consume the time of the court and jury in pursuing such a phantasm.

The appellants complain of forty-eight rulings of the court unreasonably restricting them in their direct examination of witnesses. In several instances we are of the opinion the evidence which was excluded was competent, and might well have been received. The scope of investigation under the circumstances of this case is so broad that it is often difficult to determine just where the limit should be enforced. However, upon a thorough reading of the record affecting the questions involved in these objections, we are of the opinion the appellants were not unduly restricted in that regard.

[38-40] The appellants contend they were precluded from having a fair and impartial trial for the reason that prejudicial newspaper articles and editorials were published in Sacramento and elsewhere during the progress of the trial. A motion was

presented to declare a mistrial and to cite the editors of those newspapers for contempt of court on that account. Both motions were denied. A motion for a new trial based upon that ground, among others, was subsequently denied. Our attention is not called to the record indicating that these alleged prejudicial articles were offered in evidence upon any of those motions. It is true that partisan articles, either favorable to or against an accused person, which are published during the trial of a criminal case, may unconsciously influence a jury so as to cause a miscarriage of justice. Jurors are presumed to determine the guilt or innocence of an accused person solely upon the evidence which is adduced at the trial, exclusive of any extraneous matters which may come to their attention. It is dangerous and highly improper for jurors to read such newspaper articles while they are engaged in trying a criminal case. In the interest of fair play, managers of newspapers should refrain from publishing partisan comments upon the effect of evidence adduced at the trial of a pending case. Judgments of conviction have been set aside on the presumption that such prejudicial articles have prevented fair and impartial trials. It may not be presumed, however, that an accused person is not accorded a fair and impartial trial merely because prejudicial articles appear in the local press during the trial of his case. It must also appear that the jurors read the prejudicial articles, or that the contents thereof were brought to their attention.

Since our attention is not called to the offer of these newspaper articles as evidence upon any of the motions with respect to their effect upon the verdicts, we may not take judicial notice of their contents. Nor may we presume they were read by the jurors or that their verdicts were prejudicially affected thereby.

[41] Numerous errors are assigned in giving and refusing to give proffered instructions. We have examined these challenged instructions and are of the opinion there is no substantial error in that regard. The jury was very fully and fairly instructed regarding the principles of law which are applicable to this case Among the proposed instructions which were refused are several which were drawn on the theory that the advocacy and use of force and violence by individuals or associations representing a majority of the citizenry are justifiable when a minority who are in official control prevent the majority from bringing about changes in industrial ownership or control of property or of political institutions in a peaceable manner. These instructions were properly refused. They do not constitute correct declarations of law. There is no lawful authority on the part of individuals or organizations, even though they may belong to the majority of the citizenry, to take the law into their own hands and advocate or use force and violence to obtain political control, or to appropriate property without process of law or compensation therefor, or to change the form of government. Such an assumed situation is remote and improbable. It would constitute defiance to the will of the majority amounting to insurrection. The law furnishes ample means of correcting such abuses of official power. The proposed instructions were properly refused.

Over seventy incidents which occurred during the progress of the trial are cited by the appellants as proof of alleged prejudicial misconduct on the part of the trial judge and the prosecuting officers. We have examined each of these charges and are of the opinion that none of them constitutes prejudicial misconduct under the circumstances of this case. Throughout a very lengthy and arduous trial the judge appeared to have been extremely patient and very fair and impartial in his rulings. The trial, which lasted for months, was hotly contested. It involved divergent views of opposite schools of thought with respect to political principles of government. The language employed in frequent encounters between counsel regarding the issues of the case was acrimonious. Statements were made by counsel on both sides of the case which should have been omitted. Such conflicts are not conducive to proper decorum or orderly procedure of court trials. Much may be excused on account of the earnestness and zeal of respective counsel. Many of the retorts of the prosecuting officers were invited by similar improper remarks of adverse counsel. Extravagant statements were made by counsel on both sides in their arguments to the jury. We are unable to say that any of these challenged statements of the prosecuting officers were illegitimate arguments upon fair theories deducible from the evidence. At least, we are convinced there is no reversible error in any of these assigned incidents.

[42] The effect of conflicting irreconcilable verdicts which were rendered in this case, however, compels us to reverse the judgment. There is no escape from that conclusion. It will be recalled that these appellants with nine other persons were jointly charged in two separate indictments with syndicalism, and a conspiracy to commit that offense. Demurrers were sustained to all but counts IV and VI of the first indictment numbered 12889. The two indictments were consolidated and tried together. The first indictment charged the defendants with organizing, joining, managing, and directing certain Communistic associations for the purpose of advocating, teaching, aiding, and abetting criminal syndicalism as a means of accomplishing a change in industrial ownership of property and to effect political changes. The first indictment also charged them with a conspiracy to accomplish the same purposes by organizing those named associations, and by printing, circulating, and distributing books, circulars, and documents which advocate a change in industrial ownership and control of property and of political changes by force and violence. This indictment does not enumerate or identify the unlawful documents which the defendants were charged with circulating.

The second indictment No. 12908 charges that the defendants did "by spoken and written words and personal conduct advocate, teach, aid and abet Criminal Syndicalism" to accomplish changes in industrial ownership and control of property and effecting political changes by means of force and violence, and that, for such purposes, they did publish, edit, circulate, and display books, pamphlets, and documents advocating criminal syndicalism, which said documents consisted of over thirty different pamphlets separately identified and referred to in this indictment by title. These documents which were designated in the second indictment are the identical ones procured from the Communist headquarters at Sacramento, received in evidence at the trial, and relied upon by the prosecution in proof of the allegations which are contained in the first indictment. They are the ones from which we have previously quoted.

The cause was dismissed as to two of the defendants. Seven other defendants were acquitted of all charges contained in both indictments. The appellants were acquitted of all charges contained in the second indictment, numbered 12908. The jury thereby deliberately found by the last-mentioned verdict that none of the appellants advocated, taught, aided, or abetted criminal syndicalism by means of written or printed words, by spoken language, or by personal conduct. The verdict of not guilty of the charges alleged in the second indictment must be construed to mean that the appellants did not edit, publish, issue, circulate, or display any one of the enumerated documents or pamphlets mentioned therein and relied upon to prove the allegations of the first indictment. It seems clear and inescapable that, since the appellants were deliberately acquitted by the jury of resorting to written or spoken language or personal conduct, to advocate, teach, aid, or abet criminal syndicalism, it would be impossible for them to have organized, managed, or joined associations for the purpose of teaching criminal syndicalism, or to aid, abet, or advocate those principles by circulating or distributing documents or pamphlets, or that they conspired by such means to commit the alleged crime.

It is true that the jury found the appellants guilty of counts IV and VI of the first indictment at the same time that it acquitted them of all the charges of the second indictment. It also acquitted the other seven defendants of all counts of both indictments. It is impossible to reconcile these verdicts. They are a part of the same trial and all depend upon identical evidence. The verdict on the second indictment specifically acquits the appellants of publishing, issuing, circulating, or distributing any and all of the Communist literature relied upon by the prosecution in this case. That leaves no other material portion of the first indictment except the charge that the appellants organized, managed, and joined associations for the purpose of advocating and teaching criminal syndicalism and that they conspired to commit the crime in the same manner. The verdict on the second indictment nullifies the verdict on the first indictment by impliedly finding that the appellants did not use "spoken or written words" or exercise "personal conduct" in teaching, advocating, aiding, or abetting criminal syndicalism. If that be true, then we would be bound to assume they did not organize, manage, or join associations created for the purpose of teaching or advocating criminal syndicalism, for those acts could be performed only by the use of written or spoken language, or by the exercise of personal conduct. Under such circumstances, neither could they conspire to commit criminal syndicalism without the use of written or spoken language or by the exercise of personal conduct.

Since the appellants were effectually acquitted by necessary inference of all the charges involved in both indictments we must hold that the verdict which was rendered against them on the two counts of the first indictment is in irreconcilable conflict therewith and that it is therefore void and ineffectual. No good will be subserved by a second trial. We are of the opinion the verdict of acquittal which was rendered by the jury on the second indictment will furnish conclusive proof of a former acquittal of the charges contained in the first indictment.

The judgment and the order are reversed, and the appellants are discharged from custody.

McCOLGAN v. LOHMANN & NOWELL et al.*

Civ. 10634.

District Court of Appeal, First District, Division 2, California.

Oct. 21, 1937.

Rehearing Denied Nov. 20, 1937.

Hearing Granted by Supreme Court Dec. 20, 1937.

1. Appeal and error 🔑347(1)

Minute entry stating that defendant's motions for nonsuit were granted constituted mere memorandum on which thereafter to prepare judgment, and, where record did not disclose judgment had been entered, plaintiff's appeal could not be dismissed on ground that it was taken too late (Code Civ.Proc. § 581, as amended by St. 1935, p. 1954; § 953a, as amended by St. 1935, p. 1960).

2. Appeal and error 🔑792

Where record showed that judgment of nonsuit had not been entered, notice of appeal did not confer jurisdiction on appellate court, and the court would of its own motion dismiss purported appeal, since it was premature (Code Civ.Proc. § 581, as amended by St.1935, p. 1954; § 953a, as amended by St.1935, p. 1960; § 939, as amended by St.1933, p. 306).

Appeal from Superior Court, City and County of San Francisco.

Action by R. McColgan against Lohmann & Nowell, a corporation, and others. From an alleged judgment of nonsuit, plaintiff appeals.

Appeal dismissed.

George D. Collins, Jr., of San Francisco, for appellant.

Ackerman, Wayland & Mathews and Theodore M. Monell, all of San Francisco, for respondents.

STURTEVANT, Justice.

This is a motion to dismiss an appeal. It is based on one ground, to wit, that the notice of appeal was not filed within sixty days from and after the entry of the judgment, and that it was not filed within sixty days from and after the date of the order granting the motion of the defendants and respondents herein for a nonsuit. It is supported by a certificate of the county clerk. Said certificate appears to enumerate, with one exception, each of the subjects required to be enumerated by rules V and VI of the Rules of the Supreme Court and District Courts of Appeal. The exception mentioned is with reference to proceedings for the settlement of a bill of exceptions or for a transcript under section 953a of the Code of Civil Procedure (as amended by St.1935, p. 1960). The defendants produced an affidavit to the effect that no such proceedings are pending. Neither party has shown any additional facts. From the showing made the following facts appear: 1937, March 3, order granting nonsuit and entered in minutes; May 11, notice of entry of judgment of nonsuit; May 21, notice of intention to move for new trial; July 10, order denying motion for new trial; July 12, notice of order denying motion for new trial served; July 20, notice of appeal from judgment or order granting nonsuit filed.

Going outside of the record the respondents quote the entry made by the clerk on March 3, 1937. Following his opponents outside of the record the plaintiff concedes that the entry was as follows: "Whereupon after hearing the arguments of respective counsel the court ordered that defendants' (naming them) motions for nonsuit be and the same are hereby granted." No other entry purporting to be a judgment was made.

---

*For subsequent opinion see 78 P.2d 1010.

The defendants assert that on July 20, 1937, the plaintiff appealed from the order entered March 3, 1937; that no proceedings for a new trial were commenced until May 21, 1937; that the plaintiff was bound to appeal within sixty days if new trial proceedings were not pending; that no such proceedings were pending and therefore the notice of appeal from an order made March 3, 1937, came too late when filed July 20, 1937. Their argument is based on the fact that the order made on March 3, 1937, was by the clerk entered in his minutes and was also entered in the register of actions and they quote and rely on the provisions of section 581 of the Code of Civil Procedure (as amended by St.1935, p. 1954) which deal with dismissals and nonsuits. They point out that the order in question was made pursuant to subdivision 5 of said section. They then stress that part of the last paragraph which reads, "and the dismissals mentioned in subdivisions three, four, and five of this section, must be made by order of the court entered upon the minutes thereof * * * and are effective for all purposes when so entered; but the clerk * * * must note such orders in his register of actions in the case." They then contend the order dated March 3, 1937, was the final judgment in the case from which the appeal should have been taken, as they claim within sixty days from its entry. The plaintiff replies that said language so quoted from section 581 of the Code of Civil Procedure is addressed to judgments of dismissal and not to judgments merely of nonsuit. The distinction is well founded. In 1851 the Legislature expressed in section 148 of the Practice Act the law providing for dismissals and nonsuits. That section was codified and in 1872 it became section 581 of the Code of Civil Procedure. Since 1851 the law as to dismissals has been amended several times. But as to nonsuits no amendment has been made. An examination of the section of the Practice Act and of the section of the Code of Civil Procedure just mentioned discloses no statement to the effect that an order of nonsuit is in effect a judgment. On a record, closely similar to the record in the instant case, in Kimple v. Conway, 69 Cal. 71, at page 72, 10 P. 189, 190, the court said: "There is no appeal allowed by law from an order of nonsuit, nor does the law allow an appeal from a judgment of nonsuit. If it should be urged that the judgment of nonsuit is the final judgment from which an appeal is allowed, the plain reply is that the transcript does not show that a final judgment has ever been entered. No appeal can be taken from a final judgment until it has been entered." In Stebbins v. Larson, 4 Cal.App. 482, 88 P. 505, 506, the transcript showed an entry in the minutes as follows: "The defendant's motion for nonsuit is granted and judgment of nonsuit is ordered." Speaking of the effect thereof the court said: "We find nothing in the transcript indicating that any final judgment was ever entered in the case, except as above quoted. The order quoted above does not purport to be, and is not in fact, a final judgment in the case, and under the law no appeal is permissible from either an order of nonsuit or from an order directing judgment on a nonsuit."

[1] It will not be contended that in some instances a certain entry is not a judgment. But each such entry depends on its particular form and contents. The minute entry is frequently a mere narration or a memorandum on which thereafter to prepare a judgment. Ferris v. Baker, 127 Cal. 520, 59 P. 937; In re Estate of Yale, 208 Cal. 102, 280 P. 358; Scrimsher v. Reliance Rock Co., 1 Cal.App.(2d) 382, 36 P.(2d) 688. We think the minute entry made March 3, 1937, was solely such an entry and that the record does not disclose any judgment has ever been entered. It follows that the plaintiff's appeal was not taken too late and should not for that reason be dismissed.

[2] The plaintiff concedes that it may be contended his appeal was premature. Be that as it may, he contends this motion should not be granted for the motion was not based on the ground the appeal was premature. He further cites and relies on section 939 of the Code of Civil Procedure (as amended by St.1933, p. 306). The facts show no judgment has been entered and that the notice of appeal has not conferred jurisdiction on this court. Under those circumstances a court will of its own motion dismiss the purported appeal. 2 Cal.Jur. 765.

It is therefore ordered that the appeal be dismissed without prejudice to the rights of either party.

We concur: SPENCE, Acting P. J.; GOODELL, J., pro tem.

23 Cal.App.2d 237

PEOPLE v. ONE LA SALLE FOUR-DOOR SEDAN.

Civ. 10485.

District Court of Appeal, First District, California.

Oct. 21, 1937.

Forfeitures ⚷5

Assignee of conditional sales contract covering automobile used in unlawful transportation of narcotics was not entitled to revocation of forfeiture, where assignee failed to offer any evidence as to investigation of buyer's responsibility, character, or reputation as required by statute, but contented itself with proof that contract was bona fide and that assignee had no knowledge of intended unlawful use (Gen.Laws Supp.1935, Act 5323, § 15 (b, e, f).

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding by the People for the forfeiture of One La Salle Four-Door Sedan, Engine No. 2205622, under the State Narcotic Act, § 15(b) (Gen.Laws Supp.1935, Act 5323, § 15(b), wherein the owner defaulted and the General Motors Acceptance Corporation answered. Judgment ordering restoration, and the People appeal.

Reversed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

R. G. Partridge, of San Francisco, for respondent.

GRAY, Justice pro tem.

Pursuant to section 15 (b) of the Narcotic Act (Deering's Gen.Laws Supp.1935, Act 5323), appellant filed and served, upon its owners, notice of seizure and intended forfeiture of the above-described automobile, which it claimed had been used for the unlawful transportation of narcotics. The owner of the automobile defaulted. As permitted by the section, respondent, General Motors Acceptance Corporation, answered, asserting that it was the legal owner of the automobile by reason of the seller's assignment to it of the contract by which the automobile had been conditionally sold to the defaulting owner, and claiming, in conformity to subdivision (e) of the section, (1) that such contract was bona fide, and (2) that its interest had been created after a reasonable investigation, by the seller and itself, of the responsibility, character, and reputation of the purchaser, and (3) without any knowledge that the automobile was being or was to be used for the illegal transportation of narcotics. Its answer also denied that the automobile, at the time of its seizure, was being used to unlawfully transport narcotics. At the hearing, appellant introduced testimony, the sufficiency of which is not questioned, to prove such unlawful use and then rested. Thereupon, at respondent's request and as part of its defense, appellant stipulated that the conditional sales contract was bona fide and that respondent had no knowledge of the intended unlawful use of the automobile. As to the second element of its claim, respondent offered no evidence of any investigation of the purchaser's responsibility, character, or reputation. The court did not find specifically upon the issue of investigation, but found generally that the seller and respondent had performed and done all acts required of each of them by the Narcotic Act. The state appeals from the judgment ordering the restoration of the automobile to respondent, which followed.

The state argues that, under the plain wording of subdivision (f) of section 15, the judgment was unauthorized, since respondent did not affirmatively show that the seller had made a reasonable investigation of the purchaser's responsibility, character, and reputation. On the contrary, respondent contends that it was not required to prove such an investigation, in absence of the state's production of evidence showing that the seller, by conducting a reasonable investigation, could have discovered facts which would have put a prudent seller on inquiry as to the possible legal or illegal use of the automobile. To give vitality to respondent's argument, it is necessary to so construe subdivisions (e) and (f) as to add to their positive language a qualification not therein expressed. But such construction is prohibited by section 1858 of the Code of Civil Procedure. As he states, respondent's counsel advanced the same contention in People v. One Pontiac (Cal. App.) 71 P.(2d) 302, which has been decided adversely to him since the submission of the present case. This court there held that subdivision (f) placed upon the claimant the burden of proving the three elements conjunctively enumerated in subdivision (e), and that, in absence of such proof, the trial court should find against the claimant on the element not proven, and enter judgment of forfeiture accordingly.

The judgment is accordingly reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

23 Cal.App.2d 251

PEOPLE v. PLANER.

Cr. 1574.

District Court of Appeal, Third District, California.

Oct. 21, 1937.

1. Criminal law 🔑1023(8)

Appeal did not lie from order denying motion in arrest of judgment (Pen.Code, § 1237).

2. Perjury 🔑33(3, 6)

Perjury conviction of defendant for falsely swearing at trial of civil cause that neither he nor wife signed or executed certain quitclaim deed or bill of sale *held* not sustained by evidence, where record failed to show that property involved in civil cause was same property affected by quitclaim deed, bill of sale, or contract terminating defendant's interest in property, and where there was lack of evidence as to nature of civil action (Pen.Code, § 118).

3. Perjury 🔑11(1)

A false oath, however willful, cannot be perjury unless material to issue, and, therefore, prejudicial to some one (Pen.Code, § 118).

4. Perjury 🔑31, 33(6)

In perjury prosecution, false testimony must be established by evidence and cannot be left to presumption or inference, and proof that testimony was admitted on trial is not sufficient to warrant jury's inference that testimony was material to issue (Pen. Code, § 118).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Eugene F. Planer was convicted of perjury, and he appeals.

Judgment reversed.

R. R. Sischo, of Merced, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The appellant was convicted of perjury under the provisions of section 118 of the Penal Code. The alleged perjury consists of falsely swearing, under oath, in a civil proceeding in the superior court of Merced county that neither he nor his wife signed or executed a certain quitclaim deed and bill of sale which purport to contain their signatures.

The appellant and his wife were farmers living in the vicinity of Merced. They were jointly charged, tried, and convicted of the crime of perjury. Probation was granted to Mrs. Planer. A motion in arrest of judgment was denied. From the order denying his motion in arrest of judgment, from the order denying his motion for a new trial, and from the judgment of conviction, Eugene F. Planer has appealed.

[1] The purported appeal from the order denying the motion in arrest of judgment is ineffectual. An appeal does not lie from that order which must be made before the entry of judgment. Section 1237, Pen. Code; People v. Bundy, 168 Cal. 777, 145 P. 537; People v. Fitzgerald, 14 Cal.App.(2d) 180, 58 P.(2d) 718. The appeal from that order is therefore dismissed.

It is contended the verdict and judgment of conviction are not sustained by the evidence; that the court erred in admitting and excluding evidence at the trial and in unduly limiting the appellant's cross-examination of certain witnesses; that the trial judge was guilty of prejudicial misconduct in commenting on the evidence; and that the jury was also guilty of prejudicial misconduct in considering evidence which was received outside of court.

[2] The verdict and judgment are not supported by the evidence. The appellant was convicted of falsely swearing at the trial of a civil cause that neither he nor his wife signed or executed a certain quitclaim deed or bill of sale, and that he falsely swore in an affidavit taken under oath to the effect that when they signed a certain agreement terminating their right and title

to certain lands that the document contained several blank lines which were subsequently filled in without their knowledge or consent. The agreement terminating their interest in property and the quitclaim deed and bill of sale, with relation to which he is charged with perjury, were received in evidence. The quitclaim deed describes the property affected thereby as "the South 71.42 acres of the Southeast quarter of Block three (3) Subdivision 5 of the Chowchilla Ranch, in the County of Merced, State of California, as said block is designated and delineated upon that certain map entitled 'Map of Subdivision No. 5 of the Chowchilla Ranch,' filed September 11, 1912, in the office of the County Recorder of said Merced County, in Vol. '5' of Official Plats at page 30." The bill of sale merely refers to "all of our right, title and interest in and to all that personal property as described in that certain Termination of Agreement dated October 4th, 1935." The termination agreement, dated October 4, 1935, fails to describe any property whatsoever.

It appears that the affidavit of the appellant was taken before Judge H. S. Shaffer of Merced county on February 11, 1937, to be used "in the case of O. A. Gudgel, plaintiff, versus Eugene F. Planer, defendant," and that the same judge presided at the trial of that case. This affidavit was not offered in evidence, and it does not appear what averments were contained therein which are material to the civil cause or this charge of perjury. The pleadings in the Gudgel v. Planer case above referred to were not received in evidence. A part of the cross-complaint in that action was read in evidence over the objection of the appellant. While it seems to be conceded that the civil action was maintained for the purpose of determining the right to Planer's possession of some real property, our attention is not called to any evidence, and we are unable to find in the transcript on appeal in this case any evidence as to what property was involved in the civil suit. We are unable to determine from the record the nature of the civil action in which the appellant is charged with giving false testimony. There is absolutely no evidence that the property which was involved in the civil action is the same property affected by the quitclaim deed, the bill of sale, or the agreement terminating interest in property. Unless those instruments were involved in the civil suit or the property affected thereby, it is apparent it would be immaterial whether the appellant signed or executed them. To convict the appellant of perjury it was necessary for the prosecution to prove that the appellant's false testimony in the civil case was material to the issues in that case. Section 118, Pen.Code; 20 Cal.Jur., p. 1012, § 8; People v. Perazzo, 64 Cal. 106, 28 P. 62. Section 118 of the Penal Code, under which the appellant was convicted, reads: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

[3] In the case of People v. McDermott, 8 Cal. 288, 290, the court said: "The rule is well established, that the false oath must be material to the issue, and, therefore, prejudicial to some one, otherwise, however willful, it cannot be perjury."

[4] In 21 Ruling Case Law, page 259, § 6, it is said: "The materiality of the testimony must be established by evidence and cannot be left to presumption or inference, and proof that the testimony was admitted on the trial is not sufficient to warrant a jury in inferring that such testimony was material to the issue."

For the reason that the record utterly fails to show that the real or personal property which was involved in the civil suit was the same property which is affected by the quitclaim deed, the bill of sale, or the contract terminating appellant's interest in property, and because there is a lack of evidence as to the nature of the civil action, it necessarily follows that the materiality to the issues of the civil suit of the alleged false testimony regarding the execution of those three instruments has not been shown. Upon that ground it becomes necessary to reverse the judgment.

In view of our preceding conclusions it is not necessary to pass upon the other assignments of error.

The judgment and the order denying motion for new trial are reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

PHILLIPS v. SOUTHERN CALIFORNIA EDISON CO., Limited.

Civ. 11532.

District Court of Appeal, Second District, Division 2, California.

October 20, 1937.

Rehearing Denied Nov. 10, 1937.

Hearing Denied by Supreme Court Dec. 16, 1937.

1. Electricity 🔑14(2)

Company had duty of using due care to keep right of way used by its high-powered electric transmission wires clear of anything which might make the presence of such wires a hazard in forest area.

2. Electricity 🔑19(3)

Res ipsa loquitur was applicable to forest fire, causing owner of camp resort to suffer loss of patronage, allegedly started by short circuit between high-powered electric line and wild tobacco plant on a day which was sufficiently warm to permit expansion of lines from the heat, notwithstanding testimony that distance between wire and ground was greater than electric energy of voltage involved could possibly arc in absence of conductor between wire and ground.

3. Negligence 🔑121(2)

Plaintiff was not precluded from reliance on doctrine of res ipsa loquitur because of absence of any general allegation of negligence in amended complaint.

4. Negligence 🔑121(2)

A plaintiff is not denied the benefit of the doctrine of res ipsa loquitur because he has voluntarily particularized the specific acts of negligence relied upon beyond that required by law, and although restricted in proof and recovery to specific acts alleged, and although defendant is relieved from burden of exculpating himself from any acts of negligence other than those alleged, plaintiff is not, as far as the particular acts of negligence are concerned, deprived of the benefit of the doctrine.

5. Electricity 🔑19(5)

In action by owner of camp resort for damages caused in part by loss of patronage as result of fire allegedly started by short circuit between defendant's high-powered electric line and ground, evidence *held* sufficient to sustain verdict for plaintiff.

6. Electricity 🔑19(2)

In action by owner of camp resort for damages caused in part by loss of patronage as result of forest fire allegedly started by short circuit between defendant's high-powered electric line and ground, demurrer to amended complaint based on plaintiff's failure to plead cause and nature of special damages sought was properly overruled.

7. Trial 🔑296(10)

Where court instructed jury that it was not at liberty to find facts contrary to testimony of professor of electrical engineering who testified on behalf of defendant respecting the maximum arcing distance of electric energy of voltage involved, giving of general instruction that jurors were not obliged to accept testimony as accurate if it appeared to them unreasonable or not in accordance with the physical facts was not reversible error as instructing jury that they could disregard the expert testimony because of admitted fact that arc had actually occurred.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by J. R. Phillips against the Southern California Edison Company, Limited. Judgment for plaintiff, and defendant appeals.

Affirmed.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for appellant.

Ticknor & Maxwell, by Roland Maxwell, all of Pasadena, for respondent.

CRAIL, Presiding Justice.

This is an appeal by the defendant from a judgment for damages arising out of a fire which started from a short circuit from one of the defendant's high-powered electric wires, and also from an order denying it a judgment notwithstanding the verdict of the jury.

The primary contention of the defendant is that on the evidence res ipsa loquitur rule could not be applied because, as it contends, all of the testimony shows without conflict that the arc from defendant's cable to the ground was over and across a distance greater than electric energy of the voltage involved could possibly arc in the absence of some form of electrical conductor between defendant's cable and the ground, and that whatever it was that served as such a conductor, in addition to a tobacco plant, was something over which defendant had no control.

Viewing the evidence in the light most favorable to the plaintiff, we find the following: For years the plaintiff had been the owner of a resort known as "Camp Oak Wylde," which is situated in the Angelus National Forest, and had invested in the camp and equipment large sums of money. On the afternoon of July 26, 1934, there was no fire in the immediate vicinity of a cut made in the ridge between Fern canyon and Coon canyon for the purpose of providing a clearance for the cables of the transmission lines of defendant, although there was in that vicinity a blacksmith shop with a forge from which smoke issued at various times during the day. There was no such fire until approximately 2:38 p. m. At about that time an arc occurred between one of defendant's cables and a wild tobacco plant growing under it. Through the tobacco plant the arc went to the ground at the clearance cut. The day was very warm. The warmer the day the more the transmission lines sagged. The wild tobacco plant was immediately under the transmission line where the arc occurred and was growing in the clearance cut. This plant was burned, scorched, and shattered. A section of it was found after the occurrence of the arc to have been broken down and loosely hanging at its top portion. Instantly, upon the occurrence of the arc, the men working in the vicinity noted a fire in the clearance cut at the location of the tobacco plant. This fire spread very rapidly and burned over more than 3,500 acres of the Angelus forest territory before it was finally placed under control. As a result of the fire, the Arroya Seco canyon was immediately closed and the guests were immediately ordered out of plaintiff's camp, and plaintiff was required to take steps for the prevention of possible fire damage. Since the fire the resulting erosion has blocked ingress and egress to plaintiff's camp for substantial portions of the time. The period of time following the starting of the fire was ordinarily the busiest season for plaintiff's camp. Plaintiff's telephone line was damaged and partly destroyed by the fire. Immediately, loss of patronage was suffered and the value of plaintiff's resort property was permanently impaired as the result of the fire.

[1, 2] Defendant admits that the arc started from its conductor and that it went to ground at a point where the plant was growing and followed for at least a portion of the distance between the cable and the ground one of the branches of the plant. It contends, however, that there is no evidence that any part of the plant was within arcing distance of the power line, in the absence of some other form of conductor between the cable and the plant, and that on this state of the evidence there is no opportunity for the application of the res ipsa loquitur rule. The measurements of the height of the cable included in the evidence are not conclusive because the temperature at the clearance cut on the day the fire started is unknown, and the actual height of the tobacco plant when the arc occurred is unknown. There is substantial evidence to sustain the plaintiff's theory that the cable came within arcing distance of the tobacco plant, making due allowance for the portion of the tobacco plant destroyed by the heat and fire. A logical allowance for expansion would bring the transmission lien close enough to the tobacco plant to permit the arc. The arc came from defendant's transmission line. No one else had anything to do with the maintenance of that line. Defendant was charged with the duty of using due care to keep the right of way used by that line clear of anything which might make the presence of the line a hazard in the forest area. Since no one who saw the tobacco plant before the fire was available to testify as to the precise distance within which it came to the transmission line, it is proper to resort to the doctrine of res ipsa loquitur. Rocca v. Tuolumne County Elec., etc., Co., 76 Cal.App. 569, 579, 245 P. 468; Helms v. Pac. Gas & Elec. Co. (Cal.App.) 70 P.(2d) 247; Silva v. Northern California Power Co., 32 Cal.App. 139, 162 P. 412; Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 28 L.R.A. 596, 48 Am.St.Rep. 114.

[3, 4] The defendant next contends that the plaintiff cannot rely upon the res ipsa loquitur rule because in the amended complaint the alleged negligence of the defendant is pleaded without any general allegation of negligence. A more liberal rule prevails in California. In the case of Atkinson v. United Railroads, 71 Cal.App. 82, at page 91, 234 P. 863, 867, the court said: "In adopting a rule for this state, we are of the opinion that it was not intended to declare an absolute and unqualified rule, that is, one so drastic as to deny plaintiffs in all cases, and under all circumstances, the benefit of the doctrine of res ipsa loqui-

tur, merely because they have voluntarily gone further than the law required them to go, in particularizing the specific acts of negligence upon which they relied for a recovery; but that it was intended that the more liberal rule should be followed which restricts plaintiff, in his proof and recovery, to the specific acts alleged, and relieves the defendant from the burden of exculpating himself from any other acts of negligence than those alleged, but which does not, so far as those particular acts of negligence are concerned, deprive plaintiff of the benefit of the doctrine of res ipsa loquitur." Also, see, Armstrong v. Wallace, 8 Cal.App.(2d) 429, 435, 47 P.(2d) 740; Bergen v. Tulare County Power Co., 173 Cal. 709, 720, 161 P. 269; Rocca v. Tuolumne County Elec., etc., Co., 76 Cal. App. 569, 245 P. 468.

[5] The defendant's next contention is that a new trial should have been granted because of insufficiency of the evidence to sustain the verdict, and it sets out several items in which it claims there is an insufficiency of the evidence. It is sufficient for us to say that there is substantial evidence to sustain the verdict.

The defendant's next contention is that the trial court improperly admitted evidence offered by the plaintiff. We have examined into these matters and find no prejudicial error.

[6] The defendant's next contention is that the demurrer to the amended complaint was improperly overruled because of failure of plaintiff to plead the cause and nature of the special damages sought to be recovered; but we find no reversible error here.

[7] The defendant complains of the following instruction given at the request of the plaintiff: "The jurors are not obliged to accept testimony as accurate if it appears to them unreasonable or not in accordance with the physical facts." The defendant produced as a witness Mr. Royal W. Sorenson, professor of electrical engineering at California Institute of Technology, who testified with regard to the maximum initial arcing distance under normal atmospheric conditions of electrical energy of 124,000 volts, that being the voltage on defendant's electrical conductor on which the arc occurred, and other matters of a scientific nature and proper subject for expert testimony. The defendant contends that under the instruction the jury would have been fully warranted in arguing that, in view of the admitted fact that the arc occurred and that the distance between the conductor and the plant as shown by all the evidence as to that matter was considerably in excess of the arcing distance of electricity as testified to by Professor Sorenson, his testimony regarding the same must be rejected as not being in accordance with the physical facts. This cannot be so, especially in view of the instruction requested by the defendant and given by the court, which, after referring specifically to the various matters testified to by Professor Sorenson, concluded as follows: "You are not at liberty to find facts contrary to such testimony." See, also, Rasic v. Schultheiss, 121 Cal.App. 560, at page 565, 9 P.(2d) 550.

Other instructions to the jury are complained of, but we find no reversible error in any of them.

Judgment and orders affirmed.

We concur: WOOD, J.; McCOMB, J.

---

23 Cal.App.2d 212

In re GILL'S ESTATE.

Civ. 10557.

District Court of Appeal, First District,
Division 2, California.
Oct. 20, 1937.

1. Marriage 🔑40(11)

Petitioner seeking the revocation of probate of a will on the ground that it gave to a stranger community property of testator and his alleged wife, who was petitioner's mother, was required to show existence of marriage (Prob.Code, § 228).

2. Marriage 🔑40(4)

Statute providing that man and woman deporting themselves as husband and wife were presumed to be married was a codification of common-law rule permitting proof of marriage by habit and repute (Code Civ. Proc. § 1963, subd. 30).

3. Marriage 🔑50(5)

While statute providing that all marriages should be solemnized according to statute did not repeal statute permitting proof of marriage by habit and repute, court will carefully scrutinize evidence of such a marriage (Civ.Code, § 55; Code Civ.Proc. § 1963, subd. 30).

4. Marriage ⚷50(5)

To prove a common-law marriage as permitted by statute, evidence must have shown a common, uniform, and undivided repute to the world that parties were married (Code Civ.Proc. § 1963, subd. 30).

5. Marriage ⚷50(1)

Evidence *held* not to establish that mother of petitioner and testator were husband and wife, so as to entitle petitioner to revocation of probate of testator's will leaving all his property to his housekeeper, on the ground that such property was the community property of testator and petitioner's mother (Probate Code, § 228; Code Civ.Proc. § 1963, subd. 30; Civ.Code, § 55).

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

In the matter of the estate of John Gill, deceased, wherein Viola Cotgias petitioned for the revocation of deceased's will against Augusta Burkett, executrix, and others, and wherein Edith Gill and others intervened. From a judgment dismissing petition, the petitioner appeals.

Affirmed.

Randal F. Dickey, of Alameda, Dunne & Dunne, of San Francisco, for appellant.

M. Mitchell Bourquin, of San Francisco (Max Radin, of Berkeley, of counsel), for interveners and respondents.

SPENCE, Acting Presiding Justice.

John Gill died testate in 1933. All of his property was left by his will to Mabel Greer, who was not related to him, but who had acted as his housekeeper for some months prior to his death. Viola Cotgias, the appellant herein, filed a petition for revocation of probate of said will. She alleged therein that she was the daughter of John Gill's predeceased spouse who had died in 1931. Her right to file her petition was based upon the claim that Mary Kellen, her mother, and John Gill were husband and wife at the time of her mother's death, and that John Gill had left property which had been the community property of himself and appellant's mother. Probate Code, § 228. Respondents, who were sisters of John Gill, had also contested the will and were permitted to intervene and file a complaint in intervention on appellant's contest. The issues were segregated by consent and the issue of whether appellant had such interest as would entitle her to contest the will was tried by the court sitting without a jury. The trial court found that John Gill and Mary Kellen, the mother of appellant, were never husband and wife and thereupon entered judgment dismissing appellant's petition for revocation of probate. It is from this judgment that appellant appeals.

[1] It is the contention of appellant that the evidence was insufficient to sustain the finding that Mary Kellen was not the wife of John Gill, but we find no merit in this contention.

The burden of proof was upon appellant to prove the marriage of John Gill and Mary Kellen, and she relied solely upon the presumption "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." Code Civ.Proc. § 1963, subd. 30. No direct evidence was offered to prove such marriage. Before proceeding with a discussion of the evidence found in the record, it appears appropriate to examine briefly the history of said subdivision 30 of said section 1963.

[2-4] It was enacted in 1872 together with section 55 of the Civil Code, which last-mentioned section then permitted a valid marriage to be entered into without solemnization. Said section 55 of the Civil Code was amended in 1895 to require solemnization as prescribed in the Code (Stats. 1895, p. 121), but said subdivision 30 of section 1963 of the Code of Civil Procedure has never been amended. The latter was in effect a codification of the common-law rule which permitted proof of marriage by habit and repute (Estate of Baldwin, 162 Cal. 471, 488, 123 P. 267; Wigmore on Evidence [2d Ed.] §§ 2082 and 2083), and while proof of marriage may still be thus made despite said change in the substantive law requiring solemnization, we are of the opinion that an attempt to prove a marriage in this state solely by such indirect evidence should be carefully scrutinized. It has been indicated that evidence tending to show such habit and repute may be more easily discredited, and that it is not as "significant and cogent" in jurisdictions requiring solemnization as in other jurisdictions (Wigmore on Evidence [2d Ed.] § 2082), and this must be true for any other rule would practically defeat the purpose of the change in the substantive law. But even before

such change it was held that the presumption did not arise upon a mere showing that the parties had lived together as man and wife. It was necessary to further show that the parties "by their conduct to each other and to the world thus established a common, uniform, and undivided repute that they were married." Estate of Baldwin, 162 Cal. 471, 488, 123 P. 267, 274; see, also, Quackenbush v. Swortfiguer, 136 Cal. 149, 68 P. 590; Hinckley v. Ayres, 105 Cal. 357, 38 P. 735; White v. White, 82 Cal. 427, 23 P. 276, 7 L.R.A. 799. We need only decide here that at least an equally strong showing must be made since the change in the substantive law, and that, where such indirect evidence is relied upon and the showing falls short of the above-mentioned requirements, a finding by the trial court that the parties have not been married cannot be disturbed on appeal upon the ground that it is not sustained by the evidence.

[5] We now turn to evidence in the present case. The evidence introduced by appellant showed that John Gill and Mary Kellen had lived together from 1917 until the death of Mary Kellen in 1931 and an attempt was made to show such conduct on the part of each of said parties toward the other and toward the world as to establish the required habit and repute. There was evidence to show that they were known to certain tradesmen and to certain other people as husband and wife; that certain letters were signed "Mrs. John Gill" and that certain bills and correspondence were addressed to her in that manner; that John Gill had executed a deed of trust in 1929 and that the instrument was also signed by "Mary E. Gill" and that she was designated in said deed of trust as "his wife." There was also evidence concerning some so-called industrial insurance policies taken out upon the life of "Mary Kellen" in which no beneficiary was named. After her death John Gill collected the sum of $462.80 due upon said policies and in doing so designated himself as the husband of the assured.

There was, however, evidence in the case, some elicited from appellant's witnesses and some elicited from respondents' witnesses, which tended to show that the parties had not "in their conduct to each other and to the world established a common, uniform and undivided repute that they were married," which evidence, together with other evidence, tended to indicate that the parties had never been married. We will briefly summarize some of that evidence.

John Gill had been married to another woman, and the final decree dissolving that marriage was not obtained until August, 1918. Appellant herself definitely fixed the time when her mother, Mary Kellen, had told her that she and John Gill had theretofore been married as the year 1917. Appellant returned from Fresno in the early part of 1917 and, upon meeting her mother, no mention was made of any marriage. Shortly thereafter appellant called upon her mother at the Sterling Hotel where her mother was then living with John Gill. Her mother then told her that she and John Gill had been married while the appellant was in Fresno, and appellant testified that John Gill then "joked it off" and "talked about something else." It is undisputed that the parties were then living at said hotel under the assumed names of Mr. and Mrs. Smith and that they subsequently lived there again under said assumed names. The parties later lived at the Reno Hotel for about four years under the assumed names of Mr. and Mrs. Howard. It was not until the year 1928 or possibly 1929 that the parties moved into a home in Daly City and they there used the names of Mr. and Mrs. John Gill. At one time they had lived for about fifteen months with Mrs. Knopp, one of appellant's witnesses, and she testified that, when she attempted to ascertain the date of the anniversary of their supposed marriage, they "just laughed" and said it was none of her business. Another of appellant's witnesses, the daughter of appellant, who was 21 years of age at the time of the trial, testified that she had never heard it suggested that John Gill and Mary Kellen had ever been married. One of respondents' witnesses testified that he visited John Gill at the home in Daly City and that John Gill told him, in Mary Kellen's presence, that she was his housekeeper. Numerous letters signed "Mary Kellen" and dated at various times during the years that the parties lived together were introduced in evidence. Other documentary evidence was introduced, dated during the years the parties lived together and involving insurance policies, real estate transactions, and bank accounts, in which the name "Mary Kellen" was used. It appeared that in 1919, and while said parties were living together, a will signed "Mary Kellen" was executed leaving all of her property to appellant and making no mention of John Gill. It was also shown that after her death the death certificate and death notices were in the name of "Mary Kellen." It further appeared that appellant had caused a tombstone to be erected at her mother's grave and that said tombstone bore the name "Mary Kellen."

Viewing the evidence as a whole, we are of the opinion that the trial court was justified in concluding that it fell far short of showing that said parties "in their conduct to each other and to the world established a common, uniform and undivided repute that they were married," and we are further of the opinion that the finding to the effect that the parties were never married finds support in the evidence.

The judgment is affirmed.

We concur: STURTEVANT, J.; GOODELL, J. pro tem.

---

23 Cal.App.2d 173

GORMAN v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.

Civ. 2042.

District Court of Appeal, Fourth District, California.

Oct. 15, 1937.

1. Set-off and counterclaim 🔑29(3)

Where separate causes of action, whether for personal injuries or for property damage, arise out of automobile collision, the accident is the "transaction" out of which causes arise within statutes governing counterclaims and cross-complaints (Code Civ. Proc. §§ 438, 442).

[Ed. Note.—For other definitions of "Transaction," see Words & Phrases.]

2. Abatement and revival 🔑6

Where truck driver and corporation, as alleged owner of truck, filed action against owners and driver of another truck and motorist involved in collision, and owners of such other truck filed action in superior court of another county against driver of first truck, motorist named in first action, another motorist, and individuals alleged to be owners of first truck as partners, and summons in first action was first served, all matters in issue in both actions should be litigated in first action (Code Civ.Proc. §§ 416, 438, 442).

3. Courts 🔑475(1)

The court in which process is first served has jurisdiction over whole litigation, and has full power to require parties to come into that court for complete adjudication of controversy (Code Civ.Proc. § 416).

4. Prohibition 🔑5(3)

Where one superior court first acquired jurisdiction over entire controversy arising from truck collision, writ of prohibition would issue to restrain proceedings in action in superior court of another county involving such collision, to avoid two trials, and to secure orderly administration of justice (Code Civ.Proc. § 416).

Proceeding by Elton C. Gorman, also known as Elton C. Garman, against the Superior Court of the State of California in and for Fresno County, and Hon. Ernest Klette, as Judge thereof, for a writ of prohibition.

Peremptory writ issued.

C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, for petitioner.

Rae B. Carter, of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition to restrain the respondents from taking further proceedings in an action growing out of a collision between two automobile trucks, on the ground that the superior court of Merced county first acquired jurisdiction through the service of process in another action arising from the same collision.

The collision occurred on March 27, 1937, on United States highway No. 99 at a point about eight miles south of Merced, one of the trucks being driven by this petitioner. An action was filed on April 3, 1937, in the superior court of Merced county by the petitioner and a corporation alleged to be the owner of that truck as plaintiffs, in which Daigh and Stewart, as owners of the other truck, were joined as defendants with the driver of that truck and the driver and owner of a Ford coupé which was also involved in the accident. The first service of summons in that action was made on the driver of the Ford coupé at 10 o'clock a. m. on April 5, 1937. On April 5, 1937, Daigh and Stewart filed an action in the superior court of Fresno county for damages growing out of this collision, naming as defendants the petitioner herein, the driver of the Ford coupé mentioned in the other action, the driver of a Pontiac car which was alleged to have been involved in the collision, and five persons alleged to have been doing business as partners, who are alleged to have been the owners of the truck driven by this petitioner. The five persons last referred to and this petitioner resided in Fresno. Summons in that action was served upon this petitioner about 3 o'clock p. m. on April 5, 1937. On May 14, 1937, Daigh and Stewart filed a demurrer to the complaint in the action filed in Merced county. The driver of the Ford coupé answered in that action and all defendants therein had been served when the petition herein was filed. On April 22, 1937, this petitioner filed in the superior court of Fresno county notice of a motion for an order staying proceedings in that action. After a hearing, this motion was denied by the respondent judge and this proceeding followed.

In their answer the respondents admit that summons in the Merced county action was served on one defendant about 10 o'clock a. m. on April 5, 1937, and that summons was served on one defendant in the Fresno county action about 3 p. m. on that day. No contention is made that any earlier service was had in the latter action. It is also admitted that the respondents intend to proceed with that action unless restrained from so doing. It is respondents' contention that some of the parties reside in Fresno; that the parties to the two actions are not the same; that neither the right of counterclaim nor cross-complaint exists, since there is neither mutuality of parties nor mutuality of claims; and that, if this writ issues, Daigh and Stewart, the plaintiffs in the Fresno county action, would be unable to litigate their claims in one action.

Both parties to this proceeding rely on the case of De Brincat v. Mogan, 1 Cal. App.(2d) 7, 36 P.(2d) 245, 246. The petitioner cites this case for its holding that in actions of this character the court in which process is first served has jurisdiction over the entire matter with full power to require all parties necessary to a complete adjudication of the controversy to come into that court. The respondents do not here question this rule, but rely on the latter part of the opinion in that case, which reads as follows:

"But it does not follow from this that the writ of mandate should issue. This writ is ordinarily one of discretion, and does not issue as a matter of absolute right when not necessary to prevent an injustice to the parties. [Citing cases.] Here the showing is that both parties reside in San Francisco; that but four days elapsed between the service of process in both cases, and no proceedings detrimental to the petitioner have been taken in either case; and that the entire controversy may be determined in the San Francisco court without prejudice to either side. Hence, though the court in San Mateo county had full power to assume jurisdiction over the whole controversy, we cannot say that, under the circumstances here shown, it abused its discretion in refusing to do so. Conversely, until full jurisdiction was assumed by the San Mateo court, the San Francisco court had jurisdiction to proceed with the trial."

It is argued that this case is controlling, and that petitioner is not entitled to this writ since he could cross-complain in the other action and receive complete justice there, while the issuance of the writ would work a grave injustice to the plaintiffs in the Fresno county action, since they could not file a cross-complaint in the Merced case. The respondents overlook a marked distinction between the facts of the case referred to and those with which we are now concerned. In that case the superior court of San Mateo county had made an order staying the proceedings therein which, in effect, was a refusal to exercise its jurisdiction. It was held that under the circumstances that court had not abused its discretion and that, since the San Francisco superior court also had jurisdiction, it could proceed in the matter. In the instant case the superior court of Merced county has not refused to act, and it is admitted that the superior court of Fresno county will proceed unless restrained. We have here a case where two courts have assumed jurisdiction and each intends to proceed to hear and determine all such phases of the controversy arising out of one accident as may be presented to them by the various parties thereto. A number of parties to each action are identical, and most of the material facts must be the same in both actions. If both actions are allowed to proceed to trial and he files a cross-complaint in the other action, as suggested by respondents, the petitioner will be subjected to two trials over one controversy, which may result in his being found negligent and liable for all of the damage accruing from the accident in one court and found free from negligence and entitled to recover his own loss in the other. A similar result might obtain as to some of the other parties. A mere statement of the situation is sufficient to demonstrate that the entire matter should be heard and determined in one court and to indicate that the issuance of this writ is necessary to prevent an injustice to some of the parties, including the petitioner.

[1, 2] The next question is whether the granting of the relief asked for would work an injustice on the plaintiffs in the Fresno county action, and prevent them from litigating their claims against any parties not named in the Merced case. The respondents argue that, since there is neither a mutuality of parties nor of claims, these plaintiffs could neither counterclaim nor cross-complain in the Merced action, and would be denied an opportunity to litigate their claims if not permitted to proceed with the Fresno county action. They rely on Glide v. Kayser, 142 Cal. 419, 76 P. 50, where it was held that the word "transaction," as used in sections 438 and 442 of the Code of Civil Procedure, is not intended to include a case where the counterclaim or cross-complaint has no connection with the relief asked for by the plaintiff, but is of an entirely different nature. The facts of that case disclose its inapplicability here. It is now well settled that, where separate causes of action, whether for personal injuries or for property damage, arise out of an automobile collision, the accident may be said to be the "transaction" out of which the causes arise within the meaning of sections 438 and 442 of the Code of Civil Procedure. Todhunter v. Smith, 219 Cal. 690, 28 P.(2d) 916; Morris v. Warner, 207 Cal. 498, 279 P. 152; Engleman v. Superior Court, 105 Cal.App. 754, 288 P. 723. The plaintiffs in the Fresno county action have a right to set up in the other action any counterclaim they may have, where the necessary mutuality exists, and to litigate any other claims they have by filing a cross-complaint and bringing in any necessary parties. To require them to do this will work no injustice to them, while to permit them to proceed in an independent action will lead to unnecessary duplication and confusion, with resulting injustice to some of the parties.

[3] It seems clear that the entire controversy arising from this accident should be determined in one trial and one tribunal, and we think the established rules favor, rather than prevent, such a result. The superior court of Merced county not only had concurrent jurisdiction, but acquired jurisdiction over the whole litigation with full power to bring in all necessary parties and make a complete adjudication of the entire controversy through the fact that process of that court was first served. De Brincat v. Mogan, supra. In that case the court said:

> "By the terms of section 416 of the Code of Civil Procedure a court is deemed to have acquired jurisdiction of the parties from the time of the service of the summons and a copy of the complaint, and thereafter has 'control of all the subsequent proceedings.' The jurisdiction thus acquired relates back to the filing of the complaint. Gardiner v. Royer, 167 Cal. 238, 244, 139 P. 75. * * *
>
> "Throughout the decisions we find the expression that 'the court which first acquires jurisdiction, * * * retains its jurisdiction and may dispose of the whole controversy.' 15 C. J., p. 1134, and cases cited in note 58; 7 R.C.L., p. 1067. In United States v. Lee (D.C.) 84 F. 626, Judge Wellborn has made an exhaustive review of the authorities involving actions in personam, and concludes that 'the unbroken current of authorities is to the effect that priority of jurisdiction is determined by the date of the service of process.' See page 631 of 84 F., and cases cited.
>
> "Our conclusion is therefore that in actions of this character the court in which process is first served has jurisdiction over the whole litigation and has full power to require the parties to come into that court for a complete adjudication of the controversy."

The conclusion thus reached is supported both by reason and authority, and, in our opinion, is both applicable and controlling under the circumstances here appearing.

[4] Full jurisdiction over this matter having been assumed by the superior court of Merced county, and it being admitted that the respondents propose to proceed in the other action, the issuance of the writ applied for is necessary both to prevent the injustice of requiring parties to go through two trials and to secure an orderly administration of justice.

Let the peremptory writ issue as prayed for.

We concur: MARKS, J.; JENNINGS, J.

10 Cal.2d 86

PEOPLE v. RIGHTHOUSE.

Cr. 4121.

Supreme Court of California.

Oct. 29, 1937.

1. Statutes ⚷248

A statute has no force whatever until it goes into effect pursuant to the law relating to legislative enactments, and it speaks from the date it takes effect and not before.

2. Statutes ⚷248

Where the Legislature passes an act to amend a statute then existing, the existing statute remains in full force during the time between the passage of the amendatory act and the time when it becomes effective.

3. Criminal law ⚷1219

Amendatory act changing method of inflicting death penalty did not repeal statute then in force before the effective date of the amendatory act as against contention that, as crime was committed between time of passage of amendatory act and effective date thereof, there was no method by which defendant could legally be executed (Pen.Code, § 1228, as amended by St. 1935, p. 1868, and by St.1937, p. 471).

4. Homicide ⚷253(1)

Evidence sustained determination that crime committed by defendant was murder in first degree without mitigating circumstances as against contention that defendant should have been found guilty of murder in second degree on theory that because of his mental condition he was incapable of committing crime of murder in first degree.

In Bank.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Roy Leon Righthouse pleaded guilty to an indictment charging him with crime of murder, and court found it to be murder in the first degree without mitigating circumstances, and he appeals.

Affirmed.

L. Nelson Hayhurst and John W. Guerard, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Dan F. Conway, Dist. Atty., and James M. Thuesen, Chief Deputy Dist. Atty., both of Fresno, for the People.

EDMONDS, Justice.

The appellant in this case pleaded guilty to an indictment charging him with the crime of murder committed on May 12, 1937. Upon taking evidence concerning the circumstances of its commission, the court found it to be murder in the first degree without mitigating circumstances, and judgment was imposed that the defendant suffer the penalty of death by being hanged. Upon appeal the defendant contends that at the time he committed the crime the statute prescribing hanging as the punishment for murder had been repealed and a new statute providing for execution by gas had not yet gone into effect. Consequently, so he claims, there is no method by which he may legally be executed.

For many years prior to 1937 the law of California has specified death as a punishment for murder (section 190, Pen.Code) and required that it "be inflicted by hanging the defendant by the neck until he is dead," (section 1228, Pen.Code [as amended by St.1935, p. 1868]). The Legislature of 1937 enacted the following:

"Section 1. Section 1228 of the Penal Code is hereby amended to read as follows: 1228. The punishment of death shall be inflicted by the administration of a lethal gas. Sec. 2. This act does not apply to any punishment of death imposed for any crime committed prior to its effective date." This act was approved by the Governor May 5, 1937, and became effective August 27, 1937 (St. 1937, p. 471). Const. art. 4, § 1; section 323, Pol.Code. The appellant argues that the Legislature by the use of the word "hereby" intended to repeal the then existing law as of the date of the enactment of the new statute. However, such a construction is supported by neither reason or authority.

[1-3] It has been uniformly held in this state that a statute has no force whatever until it goes into effect pursuant to the law relating to legislative enactments. It speaks from the date it takes effect and not before. Until that time it is not a law and has no force for any purpose. Santa Cruz Water Co. v. Kron, 74 Cal. 222, 223, 15 P. 772; Harrison v. Colgan, 148 Cal. 69, 76, 82 P. 674; Gilmore v. Pearson, 71 Cal. App. 284, 235 P. 665. So, where the Legislature passes an act to amend a statute then existing, the latter remains in full force during the time between the passage of the amendatory act and the time when it be-

comes effective. 23 Cal.Jur. 623. Mr. Bishop applies this general rule to statutes concerning crimes as follows: "A statute which is to become law at a future day is a nullity in the meantime. It does not even operate as notice to persons to be affected by it, nor does a repealing clause in it put an end to the law to be repealed." Bishop on Statutory Crimes, § 31.

These conclusions are both logical and reasonable. It cannot be supposed that the Legislature in amending a statute for the purpose of substituting one form of punishment for another desired the existing law to be repealed as of the date of the passage of a new law which would not become effective for several months thereafter. The use of the word "hereby" does not impel this conclusion. This word means only that by passing the act in question the Legislature decided to change the method of inflicting the death penalty. It does not indicate any intention to repeal the statute then in force before the effective date of the new enactment, assuming that this could be done. Moreover, the Legislature expressly provided that the new law "shall not apply to any crime committed prior to its effective date," which implies recognition of the rule that a statute is construed as if passed on the day it takes effect. For every statute speaks as though the Legislature was in session on the day when the act takes effect and passed it on that day. Gilmore v. Pearson, supra. The provision of the Penal Code prescribing hanging as the method of inflicting the death penalty was, therefore, in full force and effect at the time of the commission of the crime with which the defendant was charged and also when sentence was imposed upon him.

[4] The defendant also urges that this court should modify the judgment by determining the crime committed by him to have been murder in the second degree because the facts presented to the lower court show that on account of his mental condition at the time of the homicide he was incapable of committing the crime of murder in the first degree. While the evidence shows that the defendant's wife had left him three or four days before he committed the homicide and according to him he had been "doing a lot of worrying," he stated in open court that he did not want to enter either a plea of not guilty to the charge or a plea of not guilty by reason of insanity. The trial judge, after hearing the defendant's story of how he accomplished the crime, stated that he had no doubt the defendant was perfectly sane both at that time and the time the offense was committed. All of the evidence points unmistakably to this conclusion. The defendant in the middle of the night, and upon the representation that his wife was ill, lured to his home a nurse whom he had never seen before and murdered her for the sole purpose of ravishment. He planned the crime with considerable ingenuity and executed it in a manner too gruesome to detail.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; NOURSE, Justice pro tem.

9 Cal.2d 733

MILLER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 16331.

Supreme Court of California.

Oct. 27, 1937.

Rehearing Denied Nov. 26, 1937.

1. Prohibition ⇨10(2)

A writ of prohibition will be granted to restrain court from citing petitioner to show cause in contempt proceeding if court is without jurisdiction to adjudge petitioner guilty of contempt.

2. Divorce ⇨269(2)

An award of alimony may be enforced by contempt proceedings.

3. Divorce ⇨243

An ordinary money judgment does not order defendant to pay anything and merely adjudicates amount owing, while award of alimony, though partaking of nature of a judgment, goes further and is a direct command to defendant to pay.

4. Constitutional law ⇨83(3)

An obligation to pay alimony is not a "debt" within meaning of constitutional guaranty against imprisonment for debt (Const. art. 1, § 15).

[Ed. Note.—For other definitions of "Debt," see Words & Phrases.]

5. Divorce ⚷245(1), 247, 254, 269(2)

An award of "alimony" differs from payments due by virtue of "property settlement" between parties to divorce suit, in that alimony award is subject to modification by court to meet changed conditions, stops with death of party directed to pay, and is enforceable by imprisonment for contempt, whereas decree approving property settlement is not thereafter subject to modification, may continue after death, and is not enforceable by imprisonment for contempt (Civ. Code, § 139, as amended by St.1933, p. 1039).

[Ed. Note.—For other definitions of "Alimony" and "Settle; Settlement," see Words & Phrases.]

6. Constitutional law ⚷83(3)

The statutory obligation of husband to support wife is not a "debt" within meaning of constitutional provision against imprisonment for debt (Const. art. 1, § 15).

7. Husband and wife ⚷4

The state has an interest in husband's support of wife, lest wife become a public charge.

8. Constitutional law ⚷83(3)

Where wife is entitled to alimony as innocent party in divorce proceeding, property settlement agreement represents an effort by parties to fix amount to be paid as substitute for statutory marital support or in lieu of share in community property, deriving its sanction from decree approving settlement made by court with knowledge of all facts, and an order to pay a monthly allowance, even though in accordance with the agreement of the parties is not a "debt" within meaning of constitutional provision against imprisonment for debt (Const. art. 1, § 15).

9. Divorce ⚷269(2)

To support contempt proceeding for failure to pay for wife's support, there must be an order to pay, express or necessarily implied.

10. Divorce ⚷255

An order in divorce proceeding for husband's payment of support money to wife, when made and permitted to become final, is not subject to collateral attack on ground that it went beyond the prayer for relief.

11. Divorce ⚷269(2)

Where interlocutory divorce decree approved property settlement whereby wife was to have $150 a month maintenance, and ordered husband to pay such sum for maintenance, and, after final decree had been entered and proceeding brought to set it aside, husband and wife made subsequent property settlement which court approved, ordering husband to pay $75 per month pursuant to agreement, court's subsequent order was an "allowance to the wife for her support" within statute referring to alimony, and hence authorized contempt proceeding for failure to make such payment (Civ.Code, § 139, as amended by St.1933, p. 1039; Const. art. 1, § 15).

[Ed. Note.—For other definitions of "Allowance," see Words & Phrases.]

12. Divorce ⚷254

Though court cannot, without agreement of parties, modify order for husband's payment of support money in divorce suit that also approved property agreement, where parties subsequently make valid agreement for lesser amount, court may make order consistent with such subsequent agreement (Civ.Code, § 139, as amended by St.1933, p. 1039).

◆

In Bank.

Proceeding for writ of prohibition by Lawrence J. Miller, petitioner, against the Superior Court of the State of California, in and for the County of Los Angeles, Hon. Caryl M. Sheldon, Judge, to restrain further prosecution of a contempt proceeding against petitioner based on petitioner's alleged violation of an order directing him to pay support money for his former wife, Edythe Miller.

Alternative writ discharged, and peremptory writ denied.

Carlyle Miller, of San Francisco (Maynard Garrison, of Los Angeles, of counsel), for petitioner.

Everett W. Mattoon, Co. Counsel, and Nathan M. Dicker, both of Los Angeles, for respondents.

SEAWELL, Justice.

Petitioner seeks a writ of prohibition to restrain further prosecution of a contempt proceeding. Said proceeding is based on petitioner's alleged violation of an order of respondent court which directed him to pay $75 monthly for the support of his former wife, Edythe Miller. It is the contention of petitioner that he is not subject to contempt proceedings for the reason that his obligation to make said monthly payments rests on a property settlement agreement, rather than on a decree for alimony.

Prior to institution of an action for divorce by Edythe Miller, the parties entered into a property settlement which included a provision that petitioner agreed to pay Edythe Miller "for her maintenance" the sum of $150 a month for the remainder of her life or until her remarriage. There were no children of the marriage. By her complaint in the action for divorce Edythe Miller prayed that the property agreement "be made a part of the decree of the court * * * by reference".

Defendant, petitioner herein, filed an appearance, but thereafter failed to answer. The court granted plaintiff a divorce on the ground of cruelty. The interlocutory decree, entered on April 1, 1931, provided: "That certain agreement entered into on the 30th day of January, 1931, between the plaintiff and defendant, which is on file with the clerk of this court, is hereby approved and by this reference made a part of this decree.

"It is further ordered that the defendant, pursuant to said agreement, pay plaintiff for her maintenance the sum of $150 per month for the remainder of her lifetime or until her remarriage. * * *"

The final decree adopted the above provisions of the interlocutory decree. Thereafter, it is alleged, in the petition for writ of prohibition, petitioner brought an action to vacate and set aside the property settlement and the decrees of divorce. On January 30, 1936, while petitioner was in default in making payments provided for in the decrees, the parties entered into a further agreement with reference to their difficulties. The purpose of said agreement, as recited therein, was to dismiss the suit in equity and cancel the former property agreement. Petitioner's former wife thereby released petitioner from any or all claims for alimony and maintenance, or any other payments of any kind, arising out of the former agreement, or from the interlocutory or final decrees of divorce. Petitioner, in turn, agreed to dismiss his suit in equity, with prejudice, to execute to his former wife a promissory note in the sum of $1,792, payable eight months after date, to pay her immediately the sum of $1,000, to pay her attorney $500, and to pay her $75 a month for a period of three years, commencing on February 15, 1936, or until her remarriage. The agreement further provided that the final decree of divorce might be modified by the court to "include therein the obligation by Second Party to pay said monthly payments" of $75.

The court, thereafter, on June 25, 1936, on motion of petitioner, made an order as follows: "The property settlement agreement entered into January 30, 1936, and hereby submitted to the Court, the Court hereby approves said property settlement and defendant is ordered to comply with the provisions thereof forthwith and is further ordered to pay Plaintiff $75 per month, payable on the 15th day of each month commencing as of February 15, 1936, and continuing for a period of three years provided, however, that said monthly payments shall cease and terminate in the event plaintiff remarries at any time prior to the expiration of said three year period."

On October 26, 1936, the court adjudged petitioner in contempt for failure to make monthly payments of $75 for September and October, 1936. Petitioner avers that he then made these payments to avoid imprisonment. On February 16, 1937, the court issued a further order to petitioner to show cause why he should not be adjudged guilty of contempt for failure to make payments of $75 from November 15, 1936, to February 15, 1937. Petitioner objected to the jurisdiction of the court to adjudge him guilty of contempt, as he had upon the former contempt proceeding, on the ground that the divorce decrees contained no order for payment of "alimony," but only for amounts due under a property settlement agreement. The court overruled his written objections and set a date for hearing the order to show cause.

[1] In this situation a writ of prohibition will be granted, if, as petitioner contends, the court is without jurisdiction to adjudge him guilty of contempt. Andrews v. Superior Court, 103 Cal.App. 360, 284 P. 494; Pennell v. Superior Court, 87 Cal.App. 375, 262 P. 48; Mery v. Superior Court (Cal.Sup.) 70 P.(2d) 932.

[2-5] It has, of course, long been settled in this state, in line with the weight of authority, that an award of alimony may be enforced by contempt proceedings. Ex parte Spencer, 83 Cal. 460, 464, 23 P. 395, 17 Am. St.Rep. 266; Ex parte Perkins, 18 Cal. 60; Livingston v. Superior Court, 117 Cal. 633, 49 P. 836, 38 L.R.A. 175; Cain v. Miller, 109 Neb. 441, 191 N.W. 704, 30 A.L.R. 125, with note, page 130. One difference between an award of alimony and an ordinary money judgment is that the ordinary judg-

ment does not order the defendant to pay anything, it simply adjudicates the amount owing, while the award of alimony, though partaking of the nature of a judgment, goes further and is a direct command to the defendant to pay the sums therein mentioned. Schnerr v. Schnerr, 128 Cal.App. 363, 366, 17 P.(2d) 749. An obligation to pay alimony is not a "debt" within the meaning of the constitutional guaranty against imprisonment for debt. Article 1, § 15, State Const.

There are certain generally settled distinctions between alimony awarded by the court and payments due by virtue of property settlement between the parties. An award of alimony is subject to modification by the court to meet changed conditions. Ross v. Ross, 1 Cal.(2d) 368, 35 P.(2d) 316; Armstrong v. Armstrong, 132 Cal.App. 609, 610, 23 P.(2d) 50; section 139, Civ.Code, as amended by St.1933, p. 1039. A property agreement, although approved by the court in the divorce action, is not thereafter subject to modification by action of the court. Ettlinger v. Ettlinger, 3 Cal.(2d) 172, 44 P.(2d) 540; Moran v. Moran, 3 Cal.(2d) 342, 44 P.(2d) 546; Parker v. Parker, 55 Cal. App. 458, 203 P. 420. The right to unaccrued alimony stops with the death of the party directed to pay. Parker v. Parker, 193 Cal. 478, 225 P. 447; Roberts v. Higgins, 122 Cal.App. 170, 9 P.(2d) 517; Borton v. Borton, 230 Ala. 630, 162 So. 529, 101 A.L.R. 320, with note, 323. The parties may by contract provide for monthly payments during the lifetime of the wife, and in such event she has a claim against the husband's estate for payments due after his death. Disobedience of alimony decrees is punishable by imprisonment for contempt. A decree merely approving a property settlement agreement is not thus punishable. Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.(2d) 749.

In the instant case, however, the court did more than merely approve the property settlement. By reference the interlocutory decree made the original agreement, on file with the clerk of the court, a part of the decree, and, in addition, the decree contained a provision expressly ordering defendant "pursuant to said agreement to pay plaintiff for her maintenance the sum of $150 per month for the remainder of her lifetime, or until her remarriage." The order subsequently made pursuant to the second agreement of the parties, approved by the court, although it did not incorporate the agreement in haec verba or by reference, ordered defendant "to comply with the provisions thereof forthwith," and "to pay to plaintiff $75 per month * * * for a period of three years" or until her remarriage, which was in exact accord with the agreement.

There are several decisions of the District Courts of Appeal which have upheld contempt proceedings where the decree, in addition to approving a property settlement, expressly or impliedly orders the defendant to make payments in accordance therewith. The earliest of these decisions of which we are aware is Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252. In that case the trial court incorporated and set forth the property agreement in the interlocutory and final decrees. The court held that in the circumstances the incorporation of the decree was tantamount to an order to pay as provided in the agreement; that the decree had the compelling power of the court behind its every covenant, and became enforceable as a mandate of the court, that is, by contempt proceedings. This holding was followed in Ex parte Weiler, 106 Cal.App. 485, 289 P. 645; Seymour v. Seymour, 18 Cal.App.(2d) 481, 64 P.(2d) 168, and Liles v. Superior Court (Cal.App.) 65 P.(2d) 920. In addition, the rule of the Tripp Case has been recognized in several other decisions wherein it has not been deemed applicable for the reason that the decree did not contain either an express or an implied order to pay. Andrews v. Superior Court, 103 Cal.App. 360, 361, 365, 284 P. 494; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.(2d) 749; Baxter v. Baxter, 3 Cal.App.(2d) 676, 40 P.(2d) 536. In the instant case the interlocutory and final decrees and the subsequent order, as quoted above, all contain an express order to pay. See discussion, Baxter v. Baxter, supra.

Petitioner contends that, in the light of certain decisions of this court involving allied questions, the above decisions of the appellate courts recognizing enforcement by contempt proceedings of orders to make monthly payments based on property agreements should be repudiated. In Ettlinger v. Ettlinger, 3 Cal.(2d) 172, 44 P.(2d) 540, the decree approved and incorporated the property settlement and, in addition, ordered the defendant to pay the amounts therein provided. Under the above appellate court decisions a decree in this form clearly would be subject to contempt proceedings. The case did not involve a prosecution for contempt, but, rather, the question whether the decree, based as it was on the agreement of the parties, was subject to modification by the court upon the application of one party. We held that it was not. Moran v. Moran, 3 Cal.(2d) 342, 44 P.(2d) 546, and Hodgson v. Hodgson, 6 Cal.App.(2d) 496, 44 P.(2d) 544, where there was an incorporation by reference, but not an express order, are to the same effect. If such decrees possess certain attributes which are characteristic of property settlements, rather than of the usual decree for alimony, then, it is argued, they cannot possess the attribute of enforceability by contempt proceedings, which pertains to decrees for alimony not based on property settlement.

[6-8] The statutory obligation of the husband to support his wife is not a "debt" within the meaning of the constitutional provision against imprisonment for debt. Ex parte Spencer, supra; Ex parte Perkins, supra; Livingston v. Superior Court, supra; note, 48 A.L.R. 1193. An award of alimony made by the court has been declared to be a substitute or compensation for the marital support which the wife loses through fault of the husband. Ex parte Spencer, supra. The state has an interest in the support of the wife, lest she become a public charge. A property settlement agreement where the wife is the innocent party and hence entitled to alimony represents an effort by the parties to fix the amount to be paid by the husband as a substitute for, and in compensation for, the marital support which the wife loses through no fault of her own, and, in some cases, also in lieu of a share in the community property which the wife who procures a divorce is by statute entitled to have set aside to her. "Such contracts * * * derive their sanction from a decree [approving the settlement] made by the court with knowledge of all the facts." Moog v. Moog, 203 Cal. 406, 407, 408, 264 P. 490, 491. The basis of the obligation in the case of an approval and order to pay, as in the case of an award of allowance not based on agreement, is the statutory obligation of marital support which is not a "debt" within the meaning of the constitutional provision. We are of the view that the order to pay a monthly allowance, even though in accordance with the agreement of the parties, is not a "debt" within the meaning of the constitutional prohibition.

[9] To support contempt proceedings there must be an order to pay, express or necessarily to be implied. We do not hold therein that a mere approval of a property settlement, with nothing further, is such an order. Schnerr v. Schnerr, supra.

Cases from other jurisdictions, such as Dickey v. Dickey, 154 Md. 675, 141 A. 387, 58 A.L.R. 634, and Bushman v. Bushman, 157 Md. 166, 145 A. 488, to the effect that an order to pay in accordance with the agreement of the parties is not enforceable by process for contempt, are in conflict with the holdings of the appellate courts of this state, which declare a sound rule. The decision of the Oregon court in Dean v. Dean, 136 Or. 694, 300 P. 1027, 86 A.L.R. 79, is in accord with our holding herein.

[10] Petitioner further contends that plaintiff did not pray for an order commanding payment. She prayed that the property agreement be made part of the decree by reference, and for general relief. Under some of the authorities cited herein an order in the terms prayed for would have constituted an implied order to pay, punishable by contempt. However this may be, any error in going beyond the prayer would be in the exercise of jurisdiction, and the order made and permitted to become final would not be subject to collateral attack on the ground that it went beyond the prayer. Cohen v. Cohen, 150 Cal. 99, 101, 88 P. 267, 11 Ann.Cas. 520; Parker v. Parker, 203 Cal. 787, 791, 266 P. 283; Wallace v. Wallace, 111 Cal.App. 500, 505, 295 P. 1061; Ex parte Weiler, supra.

[11, 12] In the instant case the contempt proceeding is based on the subsequent order of June, 1936, ordering defendant to pay $75 a month in accord with the later agreement. Where the court makes an order to pay, as in the instant case, we are of the view that it may properly be said to have made an "allowance to the wife for her support" within the meaning of section 139, Civil Code St.1933, p. 1039. Although in this situation the court does not have power to modify the order in the absence of agreement of the parties, since the order also approved the property agreement (Ettlinger v. Ettlinger, supra), where the parties subsequently make a valid agreement for a lesser amount, as in the case herein, the court, under the power to modify given by section 139, may bring its order into line with said subsequent agreement.

The alternative writ is discharged. The peremptory writ is denied.

We concur: WASTE, C. J.; SHENK, J.; EDMONDS, J.; NOURSE, J. pro tem.; CURTIS, J.

9 Cal.2d 649

In re HARRIS' ESTATE.

L. A. 15911.

Supreme Court of California.
Oct. 6, 1937.
Rehearing Denied Nov. 1, 1937.

1. Joint tenancy 🔑5

A joint tenancy is not terminated by purchase of personal property with joint tenancy funds and placing of title thereto in name of one cotenant.

2. Descent and distribution 🔑61

The probate court erred in finding that deceased widow's whole estate was her separate property by right of survivorship under agreement with her predeceased husband that all property owned by either or acquired by them during marriage should be held in joint tenancy and distributing her entire estate to her relatives (Probate Code, §§ 228, 229).

3. Gifts 🔑30(4)
Joint tenancy 🔑3

The creation of joint bank account or joint tenancy in realty is a "gift inter vivos."

[Ed. Note.—For other definitions of "Gift Inter Vivos," see Words & Phrases.]

4. Descent and distribution 🔑61

The insertion of term "gift" before words "descent, devise or bequest," in statute providing that separate property, passing to deceased owner's surviving spouse by descent, devise, or bequest goes to such owner's relatives on survivor's death without issue, conferred on such relatives right to take, as heirs of surviving spouse on latter's death, separate property given such spouse by predeceased spouse through creation of joint tenancy between them (Probate Code, § 229).

5. Descent and distribution 🔑61

The conversion of each spouse's separate property into joint tenancy ownership by their mutual agreement, whereby each contributes separate property to joint tenancy account, does not constitute gift of such property by each to the other.

6. Husband and wife 🔑14(3)

On creation of spouses' joint tenancy ownership of realty, purchased by husband with joint tenancy funds, each owned interest therein as separate property.

7. Husband and wife 🔑14(3)

A husband, conveying to wife realty purchased by him with joint tenancy funds, severed and terminated joint tenancy, if such realty retained character of joint tenancy ownership because of its source.

8. Descent and distribution 🔑61

A husband's conveyance to wife of realty purchased by him with joint tenancy funds being inter vivos gift of his separate property to her, it was distributable on her death after he died to his relatives designated in statute (Probate Code, § 229).

9. Descent and distribution 🔑61

Since wife retained her separate interest in realty, purchased by husband with joint tenancy funds, she acquired only half interest therein by his deed thereof to her, and his relatives were entitled to distribution of only half of such property on wife's death after that of husband (Probate Code, § 229).

10. Trusts 🔑110

Realty purchased by husband with spouses' joint tenancy funds and subsequently conveyed by him to wife cannot be held to have retained its joint tenancy character on theory that husband acted in fraud of wife's rights and hence held title to property in his name as trustee for joint tenancy, in absence of evidence justifying finding of fraud on his part; right of either joint tenant to convey his separate estate without cotenant's consent being presumptively within parties' contemplation when joint tenancy was created (Civ.Code, § 683).

11. Joint tenancy 🔑5

Either of two joint tenants may convey his separate estate by gift or otherwise, without cotenant's approval or consent, and joint tenancy is terminated by such conveyance.

12. Husband and wife 🔑14(5, 10)

After severance of spouses' joint tenancy ownership by taking of title to property, purchased with joint tenancy funds, in name of one spouse, or conveyance of one spouse's interest therein to stranger, owners thereof are tenants in common.

13. Trusts 🔑72

The holder of title to property, consideration for purchase of which is furnished by stranger to title, holds title in trust for one furnishing consideration.

14. Descent and distribution 🔑61

A husband, taking title to realty purchased by him with spouses' joint tenancy funds, took half interest in his own right as separate property and half interest as trustee for his wife, and hence conveyed his half, constituting his separate property, by his deed of such realty to wife.

15. Descent and distribution 🔑61

The relatives of husband, dying intestate without issue, were entitled to distribution of half of realty, purchased with spouses' joint tenancy funds and conveyed to wife by him, on wife's subsequent death (Probate Code, § 229).

16. Descent and distribution 🔑61

A deceased wife's heirs inherit as her separate property half of realty conveyed to her by her husband, who predeceased her, in fulfillment of his duty as trustee of half interest in realty, to which he took title on purchasing it with joint tenancy funds (Probate Code, § 229).

17. Descent and distribution 🔑61

The relatives of deceased wife and her predeceased husband, both of whom died intestate without issue, were each entitled to distribution of half of proceeds of wife's sale after husband's death of realty purchased in his own name with joint tenancy funds and subsequently conveyed to her by him (Probate Code, § 229).

18. Executors and administrators 🔑314(8)

One whose right as heir depends on certain relationship to deceased, plus fact that property claimed was formerly community property of deceased and latter's previously deceased spouse or such spouse's separate property, has burden of showing such additional fact.

19. Joint tenancy 🔑3

A joint tenancy ownership in real property cannot be created by oral agreement (Civ.Code, § 683).

20. Descent and distribution 🔑61

The relatives of deceased husband, who conveyed to his wife realty constituting his separate property, title to which remained in her and never became part of realty owned by them as joint tenants under mutual agreement, are entitled to distribution of all of it on wife's death intestate without issue (Probate Code, § 229).

21. Executors and administrators 🔑383

Evidence that realty, purchased by husband with funds from spouses' joint bank account a few days before his death, probated as community property by surviving wife, and sold during course of probate for sum applied to satisfaction of husband's debts, was not actually sold in probate proceedings, but taken by purchaser in his own name without paying consideration and later reconveyed to wife, was properly excluded at hearing on petition for distribution of wife's estate.

22. Descent and distribution 🔑61

Realty, purchased by widow with proceeds of sale of stock acquired by her as survivor under joint tenancy agreement with her husband, as well as personalty held by them as joint tenants before husband's death, should be distributed to widow's, not husband's, heirs (Probate Code, § 229).

23. Courts 🔑472(4)

The question whether wife orally agreed to divide property, given her by husband, who predeceased her, between his and her relatives equally on her death, cannot be litigated in probate court on petition for distribution of her estate; remedy of person injured by violation of contract to make testamentary provision being in court of equity.

24. Wills 🔑58(1)

An oral agreement, entered into between spouses before statutory amendment requiring it to be in writing, that husband would give wife all his property and that she would divide it between his and her relatives equally on her death, would be valid, regardless of spouses' joint tenancy agreement.

25. Husband and wife 🔑49½(3)

The creation by husband of a joint tenancy with wife is a "gift."

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

26. Judgment 🔑715(3)

The Supreme Court's decision that property, acquired by husband with funds from spouses' joint tenancy account, was joint property, belonging to widow after husband's death, was not res judicata on question of widow's breach of oral agreement with husband to divide property, given her by him, between his and her relatives equally on her death, in proceeding by his relatives for distribution of her estate.

27. Judgment 🔑715(3)

The probate court's finding on contest of deceased widow's wills that certain persons were deceased's sole heirs was not res judicata as to her predeceased husband's relatives, claiming as widow's heirs in proceeding for distribution of her estate, and did not preclude them from sharing therein; material issue in such contest being validity of wills (Probate Code, § 229).

◆

In Bank.

Appeal from Orange County; James L. Allen, Judge.

In the matter of the estate of Maria L. Harris, deceased. From a decree of distribution, A. E. Harris appeals.

Affirmed in part and reversed in part, with directions.

Prior opinion, 65 P.(2d) 117.

W. M. Greathouse and C. E. McDowell, both of Los Angeles, and Head, Wellington & Jacobs and Otto A. Jacobs, all of Santa Ana, for appellant.

R. Y. Williams and Charles D. Swanner, both of Santa Ana, for respondents.

CURTIS, Justice.

This is an appeal from a decree of distribution distributing to the respondents, the two brothers and a sister of Maria L. Harris, the entire estate of said decedent, who died intestate without issue. The appellant is a brother of Richard T. Harris, the previously deceased husband of Maria L. Harris, who in behalf of himself, other brothers, sisters, nieces, nephews, and the wives of deceased brothers, seeks to share in the deceased wife's estate, appraised at $74,246.98.

Objection to the distribution of all of the property in the estate of Maria L. Harris, hereinafter referred to as decedent, to her relatives, was made by appellant upon the ground that all of the property inventoried in the estate of decedent, with the exception of two small parcels, came to the decedent by an inter vivos gift to her from her husband of his separate property, and that these two parcels came to her by operation of law upon the death of her prior deceased husband by virtue of the fact that they had been the community property of said spouses. Appellant claims by virtue of sections 228 and 229 of the Probate Code to be entitled to have distributed to the relatives of said R. T. Harris, designated in said Code sections, all of the separate property of said previously deceased spouse remaining in the estate of decedent which came to decedent by gift from her husband during his lifetime, and one-half of the property remaining in her estate which had been the community property of said spouses.

[1] In order to understand the arguments advanced relative to the applicability of said Code sections to the property inventoried in the estate of decedent, Maria L. Harris, a brief résumé of the proceedings taken in the probate of the estate of R. T. Harris is necessary. Upon the death intestate and without issue of R. T. Harris in 1911, after twenty-three years of married life with Maria L. Harris, his surviving widow as administratrix of his estate returned in the inventory and appraisement of his estate no personal property and only one parcel of real property valued at $5,000, which had been purchased by him a few days before his death and held in his name as sole grantee, which real property she declared to be community property. Although at the time of his death R. T. Harris apparently owned an estate of considerable magnitude, consisting of real and personal property, with the exception of the above-mentioned real property, none of it was included in the inventory of his estate. The reason for this omission was that for several years the funds of Harris and his wife had been kept in a joint tenancy bank account, and the bulk of the real property purchased by Harris during their married life was taken by him as sole grantee, and by him deeded to his wife, which deeds were recorded by her after his death. One piece of real property, included in the inventory as parcel No. 3, and known as the Home Place, which had been acquired early in their married life, had been deeded to Maria L. Harris as sole grantee by the grantor thereof, and another piece of real property had been taken in the name of R. T. Harris and Maria L. Harris as joint tenants. Maria L. Harris, therefore, claimed all of the property, with the exception of the $5,000 piece of real property, as her own property and omitted it from the inventory of his estate. During the course of the probate, the parcel of real property was sold to one Crookshank for $5,000, and the whole purchase price applied by the administratrix to the satisfaction of the debts of R. T. Harris, which came to slightly more than $5,000. Objections to the final account of said administratrix were made by Clara

G. Fulsom, a sister of R. T. Harris, solely upon the ground that said administratrix had failed to account for certain personal property of the approximate value of $40,000, part of which consisted of shares of stock, the certificates to which had been issued to R. T. Harris, and by him indorsed and placed in the safe-deposit box in which was kept the property of both spouses. The probate court in that proceeding found that the property described in the objections was the property of Maria L. Harris, and not the property of the estate of R. T. Harris, that nothing remained in the estate to be distributed, and approved said final account. Upon appeal, this court, after stating that said spouses at the time of their marriage each had separate property and had established a joint bank account with the right of survivorship in pursuance of an agreement between them during the early years of their marriage, which provided that all property held or acquired by either or both of them during the marriage should be held in joint ownership as joint tenants, and that they had deposited the money received from earnings, proceeds of property, and all other sources by either of them in accordance with said agreement, and that all the property in controversy had been acquired with money from this joint account, held that the property acquired with funds from this joint tenancy account, in the absence of an agreement between the parties that the character was changed, retained the character of joint property, the same as the money with which it was obtained, and therefore belonged to the widow as the survivor. In re Estate of Harris, 169 Cal. 725, 147 P. 967. The court reached this conclusion upon the reasoning that, as there was no statutory prohibition against the transfer of personal property by oral agreement, the agreement of the spouses to hold their property in joint tenancy operated to create a joint tenancy in the personal property acquired by them, notwithstanding the fact that the purchase price had actually been withdrawn from the joint tenancy account and that, as to certain of the personal property, the title on its face stood in the name of only one of the joint tenants. By this decision the court laid down the rule that joint tenancy property may be traced into personal property and the personal property so acquired with joint tenancy funds will be deemed to be held in joint tenancy, in the absence of an agreement to the contrary, regardless of the circumstance that title to said acquired property may be held by only one of the joint tenants. Although this conclusion that, where personal property is purchased with joint tenancy funds and title is placed in the name of one of the cotenants, the joint tenancy is not terminated, despite the destruction of one of the necessary unities, namely, unity of title, appears to be contrary to the common-law rule, nevertheless, this exception to the common-law rule, which had its origin in Re Estate of Harris, supra, has become the recognized and established law of this state, and has been followed in numerous recent decisions. Lagar v. Erickson, 13 Cal.App.(2d) 365, 56 P.(2d) 1287; In re Estate of McCoin, 9 Cal.App.(2d) 480, 50 P.(2d) 114; In re Kessler, 217 Cal. 32, 17 P.(2d) 117; Young v. Young, 126 Cal.App. 306, 14 P.(2d) 580. It should be noted here, perhaps, that the decision upon that appeal only dealt with the personal property alleged to have been omitted from the inventory of the estate of R. T. Harris, and did not purport to deal with any real property. This is necessarily so for the reason that the sole objection made in said proceeding was that the administratrix had failed to account for certain personal property. As the administratrix by deeds held title to all of the real property of the spouses, and the relatives of R. T. Harris apparently admitted the validity of said deeds, no reason existed for any question to arise with reference to real property. It should also perhaps be noted that all of the decisions which have followed the rule laid down in Re Estate of Harris, supra, are decisions which affect personal property only.

The property involved in this controversy has been listed by appellant into six different categories according to their nature and origin, and, for convenience of discussion, we shall use this classification. First kind: Parcels of real property which were purchased by deceased husband, R. T. Harris, with funds from the joint bank account of himself and Maria L. Harris, his wife, title to which real property was taken from time to time solely in his name and deeds to which property were executed by R. T. Harris in favor of his wife, Maria L. Harris, within from one to two months after each purchase respectively and which deeds were recorded at one time, about a month after his death. Second kind: The sum of $23,000 being the proceeds of a sale of similar real property made by Maria L. Harris after the death of R. T. Harris. Third kind: A parcel of real property acquired in the early years of the married life of the spouses, title to which was taken, and has always continued, in the name of the wife. Fourth kind: A parcel of real property (being the whole of lot 4 and an undivided one-half of lots 5 and 12 in block 12 of the Pacific Electric Subdivision of the Ross Tract, referred to in parcel 4 of the inventory and appraisement of Maria L. Harris' estate), claimed by appellant to have been purchased by R. T. Harris before any joint bank account was created, and which has at all times stood of record in his name, and which was omitted from the inventory of the estate of R. T. Harris, possibly through inadvertence. Fifth kind: A parcel of real property purchased by R. T. Harris with funds from the joint bank account a few days before his death and probated as community property by his wife. Sixth kind: Personal property held in joint tenancy by R. T. Harris and Maria L. Harris before the death of R. T. Harris, and real and personal property acquired by Maria L. Harris after the death of R. T. Harris from the proceeds of such joint tenancy personal property.

[2-4] The court rejected the claim of appellant to have any part of the estate of Maria L. Harris distributed to relatives of R. T. Harris, specified in sections 228 and 229 of the Probate Code, and made its decree distributing the entire estate of Maria L. Harris in equal shares to the respondents, the two brothers and sister of Maria L. Harris, deceased. In its decree of distribution the court found: "The whole of said estate was the separate property of said Maria L. Harris, deceased, and did not come to her by gift from R. T. Harris, her deceased husband, but said decedent became the owner of the whole of said property by right of survivorship, under an agreement entered into between said decedent and R. T. Harris, her deceased husband, in the early years of their married life, whereby it was agreed that all property which either owned as separate property, or which they had or might acquire during their married life, as community property, should be held in joint tenancy with the right of survivorship to the one surviving. That the said R. T. Harris predeceased said Maria L. Harris, and all his interest in said property so held in joint tenancy under said agreement terminated, and Maria L. Harris became the sole owner by said right of survivorship."

We are of the opinion that the probate court was in error in making the finding just quoted, and upon such finding distributing the entire estate of Maria L. Harris to the respondents. It is undisputed that the descent of property is governed by the law in force at the time of the death of the person whose property is to be distributed. In re Estate of Putnam, 219 Cal. 608, 28 P.(2d) 27. The provisions of section 228 and section 229 of the Probate Code, as amended in 1931, therefore govern and control the distribution of the property in the estate of Maria L. Harris, who died July 2, 1933. Prior to the 1931 amendment, whereby the word "gift" was added to said section 229 of the Probate Code, the relatives of a predeceased spouse were entitled to inherit in the estate of the surviving spouse, such property as had been the separate property of the predeceased spouse and had come to the decedent from such spouse by descent, devise, or bequest. In 1931, the Code Commission, as they said, "in order to make the section logically complete," added the word "gift". The result was that upon the death of the surviving spouse the relatives of a predeceased spouse became entitled to inherit under said provisions such property as had been the separate property of said predeceased spouse and had come to said surviving spouse by inter vivos gift from said predeceased spouse. Said section after amendment read as follows: "If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation." In view of the settled law of this state that the creation of a joint bank account is a gift inter vivos (Bell v. Moloney, 175 Cal. 366, 165 P. 917; George v. Daly, 83 Cal. App. 684, 257 P. 171), and that the same rule applies to real estate (Tilden v. Tilden, 81 Cal.App. 535, 542, 254 P. 310), we see no escape from the conclusion that the insertion of the term "gift" in said section 229 conferred upon the relatives of the predeceased spouse, specified in said section, the right to take as heirs of the surviving spouse such separate property as by the creation of a joint tenancy ownership therein had been given by the predeceased spouse to the surviving spouse. While for the sake of simplicity in the administration of the estates of such decedents it might seem desirable to interpret the word "gift" as only referring to outright gifts of the entire interest in separate property, and to hold it inapplicable to the creation of joint tenancy interests, in view of the hereinbefore cited cases, such an interpretation is not permissible.

[5] Appellant insists that the decision in Re Estate of Harris, supra, only went so far as to hold that the personal property involved was held in joint tenancy, and did not determine whether or not the property from which said joint tenancy was created was the separate property of R. T. Harris and was an inter vivos gift by R. T. Harris to his wife, and that, if he can establish the fact that it was the separate property of R. T. Harris and that the creation of a joint tenancy ownership with his wife constituted a gift by R. T. Harris to her, he and the other relatives of R. T. Harris are entitled to succeed to the whole thereof under section 229 of the Probate Code. However, the court in Re Estate of Harris, supra, did determine, as shown on the face of its opinion, that both spouses owned separate property and entered into a binding agreement that each would contribute all the property held by them or acquired during marriage in joint tenancy. It cannot be said, we think, that if a husband and wife enter into a mutual binding agreement whereby each contributes his and her separate property to a joint tenancy account, that the converting of said separate property of each of the spouses into a joint tenancy ownership constituted a gift by each to the other of his or her separate property.

[6-11] Such conclusion does not, however, entirely negative appellant's right to inherit the real property which was bought by R. T. Harris with the funds from this joint tenancy account (classified as the first kind of property) nor the right of the relatives of R. T. Harris to inherit the proceeds of a sale of similar real property which sale was made by Maria L. Harris, after the death of R. T. Harris. As previously indicated, the real property which was purchased by R. T. Harris with the joint tenancy funds was shortly after its purchase deeded by him to his wife, and these deeds were recorded after his death. Upon the creation of the joint tenancy ownership, each owned their interest therein as separate property. Siberell, v. Siberell, 214 Cal. 767, 7 P.(2d) 1003. If it could be said that the real property purchased with the joint tenancy funds retained the character of joint tenancy ownership by virtue of their source, R. T. Harris, by deeding the property to his wife, severed the joint tenancy and terminated it. Hiltbrand v. Hiltbrand, 13 Cal.App.(2d) 330, 56 P.(2d) 1292. This gift, being an inter vivos gift of his separate property, was upon the death of his wife distributable to the relatives of R. T. Harris, designated in section 229 of the Probate Code. Since she retained her separate interest in the joint tenancy property, she acquired only a one-half interest in said property by virtue of the deed from her husband, and the relatives of R. T. Harris would be entitled to have distributed to them a one-half of said property. Section 229, Probate Code. However, in view of section 683 of the Civil Code defining a joint tenancy, we are of the opinion that, as to the real property herein involved, the only possible manner in which the real property purchased with joint tenancy funds could be held to have retained its joint tenancy character would be to impress a constructive trust upon said property upon the theory that R. T. Harris in withdrawing joint tenancy funds had acted in fraud of his wife's rights and for this reason should be held to hold title to the property in his own name as trustee for the joint tenancy. Under the facts of the instant case, such a view does not seem tenable. It is one of the incidents of joint tenancy that either joint tenant may convey his separate estate by way of gift or otherwise without the approval or consent of his other joint tenant, and upon such conveyance the joint tenancy is terminated. Delanoy v. Delanoy, 216 Cal. 23, 13 P.(2d) 513. This incident of joint tenancy ownership must be presumed to have been in the contemplation of the parties at the time of the creation of the joint tenancy ownership. Moreover, in view of the fact that there is not the slightest intimation in the record that the relations of the mar-

ried couple were not most harmonious, and in view of the testimony of Maria L. Harris in the R. T. Harris probate matter that she was familiar with her husband's business and that whenever there was any purchase of property she and Mr. Harris talked the matter over and jointly concluded whether or not they would buy the property, we think a finding of fraud on the part of the husband would be entirely unjustified. This conclusion is strongly fortified by the fact that after the purchase of each parcel of real property in his own name he executed deeds to his wife.

We are not willing to subscribe to the theory that in the absence of proof it was the agreement of the cotenants, husband and wife, that the husband in purchasing the real property used only his half interest in the joint tenancy funds and took all the real property as his own separate property. Such a holding would in other cases open wide the door of actual fraud to unscrupulous persons and place the burden of proving the retention of an interest in joint tenancy property upon the passive joint tenant rather than upon the person actively transferring the title. This would be most inequitable and work an undue hardship upon the innocent co-owner.

[12-16] We are of the opinion that the same result flows from the severance by one spouse of a joint tenancy ownership by the taking of property purchased with the joint tenancy funds in his or her own name, as results when one joint tenant deeds his interest in the property to a stranger. Delanoy v. Delanoy, supra. The owners of said property thereafter each own the same as tenants in common. It is true that the title stands in the name of the spouse severing the joint tenancy and taking title to the acquired property in his or her own name. It is elementary, however, that, if the consideration for the purchase of any property is furnished by a stranger to the title, the holder of the title, by operation of law, holds the title in trust for the one who furnished the consideration. It may reasonably be concluded, therefore, that in the instant case, as one-half of the purchase price of the property consisted of the undivided one-half interest of the wife in the joint tenancy funds, that the husband in taking title to said real property, took a one-half interest in his own right as separate property and a one-half interest as trustee for his wife. By this deed to her he gave to his wife his one-half of said property which, as we have seen, was prior to the execution of said deed, his separate property. This property which he gave to his wife, his relatives are entitled to have distributed to them by virtue of the provisions of section 229 of the Probate Code. As to the one-half of said property which he held as trustee, he conveyed this to her in fulfillment of his duty as trustee. This one-half which belonged to his wife in her own right, her heirs are entitled to inherit as her own separate property. To sum up, as to the first kind of property hereinbefore set out, consisting of parcels 9, 10, and 11, of the inventory and appraisement in the estate of Maria L. Harris, the relatives of Maria L. Harris are entitled to distribution of a one-half thereof as her separate property, and the relatives of R. T. Harris designated in section 229 of the Probate Code are entitled to have distributed to them the other one-half of said property as the separate property of her predeceased spouse which had come to her by gift from him.

[17, 18] The same applies to the proceeds of the sale of real property which had come to Mrs. Harris under similar circumstances and which had been sold by her in 1919. (Classified as the second kind of property.) Section 229 of the Probate Code would apply to this property only in the event that any portion of it remained in her estate upon her death as during her lifetime she had a perfect right to deal with it as she pleased as it was her own separate property. In view of the fact that it appears that during her lifetime Maria L. Harris gave large sums to churches and other institutions, it may be that the appellants will have considerable difficulty in proving that any portion thereof remained in her estate at the time of her death. Appellant relies strongly upon the case of Stafford v. Martinoni, 192 Cal. 724, 221 P. 919, 924, as placing the burden of making an accounting of such funds upon the administrator of the estate of the decedent. There is language in that case to the effect that, since the widow held property during her lifetime in trust "for the benefit of his estate and heirs," her administrator should be held to such an accounting as would disclose what portion of such property was derived from the community property of herself and husband. It is apparent that in that case the reason the widow was held to hold certain property

in trust for the benefit of her husband's heirs, was that at the time of the death of her husband his relatives were entitled to share to the extent of one-half in any community property owned by the spouses not disposed of by will. Upon the death of her husband, she failed to include in her inventory property which upon her death was claimed by her husband's relatives to have been community property of the spouses. As to this property which should have been distributed to her husband's relatives upon the death of her husband, it is obvious that she held it as trustee for them during her lifetime, and the burden of accounting therefor should properly be upon her representative. This is not the situation here. During her lifetime, Maria L. Harris was the absolute owner in her own right of all the property which had come to her from her husband. She could give it away or will it away. It was only in the event of her dying intestate and without issue that the right of the relatives of her predeceased husband to inherit any part of the estate which had come to her from him came into existence. It has long been the rule that, where the right of a person as heir depends not merely upon the fact of a certain relationship, but upon the fact of such relationship plus the fact that the property he claims as heir had formerly been either the community property of the decedent and her previously deceased spouse or else the separate property of the latter, the burden of showing such additional fact rests upon him. In re Estate of Simonton, 183 Cal. 53, 190 P. 442.

[19, 20] In view of the fact that we hold that a joint tenancy ownership in real property cannot be created by an oral agreement by reason of the provisions of section 683 of the Civil Code, it follows that as to the third kind of property, being parcel 3 in the inventory and appraisement, which is claimed by appellant to be the separate property of R. T. Harris, which property was acquired in the early years of the married life of the spouses, title to which in 1895 was taken and has always continued to remain in the wife, and which never became a part of the joint tenancy transaction, if appellant can establish that it was the separate property of R. T. Harris, and was given by him to his wife during their marriage by deed direct to her from the grantor, the relatives of R. T. Harris are entitled to have the whole thereof distributed to them, since, as to such parcel of real property, the gift would consist of the entire ownership of such property.

As to the fourth kind of property, it appears from the record that it was acquired through two separate deeds, one dated October 1, 1906, and one dated April 29, 1907. This property was omitted from the inventory of the estate of R. T. Harris. It appears, according to the statement of appellant, that from June 28, 1905, the only bank account of the spouses was carried in the name of Mr. or Mrs. R. T. Harris, and that in 1909 the account was changed into a joint tenancy account. There seems to be no definite date fixed as to when the spouses made the agreement to hold their separate property in joint tenancy. The opinion in Re Estate of Harris, supra, merely states that it was made during the early years of their marriage. They were married on July 23, 1888. The distribution of this property will depend entirely upon its character at the time of the death of R. T. Harris, that is, whether it was his separate property, or the community property of himself and wife, or whether it was held by the spouses as tenants in common. There is no finding of the court upon this question, and the evidence is such that it cannot be determined from the record in which of these three relationships said property was held by R. T. Harris. When the trial court has determined this question in accordance with the rules above announced, the property will descend and belong to the parties entitled to the same under the law of succession in force at the respective dates of the deaths of the spouses. In no event will respondents be entitled to have distributed to them all of said property.

[21] The fifth kind of property consisted of a parcel of real property purchased by R. T. Harris with funds from the joint bank account a few days before his death and probated as community property by his wife. Appellant at the probate hearing was not permitted to introduce evidence to prove that this parcel of real property was not in fact sold in the probate proceedings in the estate of R. T. Harris, but was only taken by Crookshank in his own name without the payment of any consideration and three years later was deeded back to Maria L. Harris. Appellant argues that in attempting to introduce such evidence he was not collaterally

attacking the probate sale of the real property in the former probate proceedings. The court did not err in excluding this evidence. If the sale was irregular, it should have been attacked in an independent proceeding. If Crookshank did not pay any consideration, the administratrix probably paid the debts of the decedent out of the funds which came to her as survivor of the joint tenancy. This would be her own separate property. In O'Connor v. Flynn, 57 Cal. 293, in setting aside a sale which was illegal by reason of the fact that it had been made to the executor of an estate, an account was ordered wherein the executor was credited with the purchase price of said property. Over twenty years have elapsed since said sale, and we do not believe that the equities of the situation could be adequately gone into in the hearing upon the petition for distribution in the estate of decedent.

[22] As to the sixth kind of property, the probate court, with reference to the real property, found that the decedent, Maria L. Harris, acquired seven parcels of real property subsequent to the date of the death of R. T. Harris, her deceased husband, by purchase with funds from the sale of stock acquired by said decedent by right of survivorship under the joint tenancy agreement entered into between said decedent and R. T. Harris during the early years of their married life. It follows from what we have hereinbefore said that this real property, as well as the personal property held in joint tenancy by R. T. Harris and Maria L. Harris before the death of R. T. Harris, should be distributed to the respondents, the heirs of Maria L. Harris, since section 229 of the Probate Code does not confer upon the relatives of a predeceased spouse the right to inherit in the estate of decedent property which came to said decedent by right of survivorship.

[23-26] Appellant also attempted to establish the fact that in 1904 an oral agreement was entered into between R. T. Harris and his wife, whereby R. T. Harris agreed to give his wife all property, and she agreed that, after she had "taken a good living out of it," she would divide it equally between his relatives and her relatives. After her death, two copies of wills were found which were refused probate, in which she left considerable property to churches and made some provisions for her husband's relatives as well as her own. Although appellant presents a plausible argument as to why the probate court herein should take jurisdiction to determine the issue of such an oral agreement, this question cannot be litigated in a probate court, but the remedy of a person injured by the violation of a contract to make testamentary provision for another must be pursued in a court of equity. Fuller v. Nelle, 12 Cal.App.(2d) 576, 580, 55 P.(2d) 1248; In re Estate of Rolls, 193 Cal. 594, 596, 226 P. 608. We are of the opinion that such an oral agreement, if entered into in 1904 prior to the amendment requiring such an agreement to be in writing, would be valid, if it could be established. Staples v. Hawthorne, 208 Cal. 578, 283 P. 67. This is so regardless of the joint tenancy agreement between the spouses, as there is nothing inconsistent with an agreement that the husband agreed to give his wife all of his property and the wife agreed upon her death that it would be divided equally between both families and the creation of a joint tenancy ownership. The creation of a joint tenancy is a gift, and that may well have been the method adopted by the husband to fulfill the terms of such an oral agreement to give his wife all the property, if the oral agreement existed. In re Estate of Gurnsey, 177 Cal. 211, 170 P. 402. Nor is the decision in Re Estate of Harris, supra, res judicata upon this question. As the question could not possibly arise until the death of Maria L. Harris and her failure to perform the terms of such agreement, if any, this previous decision could not foreclose appellant from raising the question upon the death of Maria L. Harris.

[27] The argument is advanced by respondents that the finding, upon the will contest of the wills of Maria L. Harris, to the effect that these respondents were the sole heirs of Maria L. Harris, is res judicata as to the relatives of R. T. Harris claiming herein as heirs of Maria L. Harris, and preclude their sharing in the estate of Maria L. Harris. The verdict in that contest could not affect the right of the relatives of R. T. Harris to take as heirs of Maria L. Harris, for the reason that the material issue in said contest was simply the validity of the two wills offered for probate. The relationship of respondents to Maria L. Harris in the will contest was an incidental matter.

The decree is affirmed as to the fifth and sixth kinds of property described and set forth herein, and is reversed as to the first, second, third, and fourth kinds of property mentioned above, with directions to the trial court to take such further proceedings as may be necessary to enable it to properly distribute said four kinds of property to the parties entitled thereto in accordance with the views herein expressed.

We concur: WASTE, C. J.; SHENK, J.; NOURSE, Justice pro tem.; EDMONDS, J.; SEAWELL, J.

9 Cal.2d 741

BECKER et al. v. MUNKELT et al.

L. A. 15945.

Supreme Court of California.

Oct. 27, 1937.

Rehearing Denied Nov. 26, 1937.

1. Appeal and error ⊂⇒347(1)

The fact that clerk of court has performed statutory duty of entering a synopsis of order rendered by court does not prevent subsequent entry of order signed by judge, and appeal taken within 60-day period after entry of order signed by judge is timely (Pol.Code, § 4178).

2. Appeal and error ⊂⇒544(3)

Appeal could not be dismissed on ground that motion made by respondents to terminate proceedings in lower court for preparation of record on appeal had been granted where transcript filed by appellants and duly authenticated by clerk of lower court contained sufficient matter to entitle appellants to prosecute an appeal on the judgment roll.

In Bank.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Myrtle Becker and another against Glen H. Munkelt and others. From an adverse judgment and order, defendants appeal. On motion to dismiss appeal.

Motion denied.

Hamilton, Lindley & Higgins, and Glen H. Munkelt, all of San Diego, for appellants.

Harry W. Horton, of El Centro, for respondents.

WASTE, Chief Justice.

Respondents move for a dismissal of the appeal in this cause upon the grounds, first, that the appeal was not taken within the time allowed by law, and no record on appeal has been prepared; and, second, that all proceedings for the preparation of a record on appeal have been terminated by order of court.

The action relates to certain money deposited with the clerk of the trial court in a previous trial. Two motions for the payment of the money were made, one by plaintiffs and one by defendants. The minutes of the court of May 20, 1935, read as follows: "The motion of plaintiffs that the monies on deposit [be] paid to said plaintiffs is granted by the Court. The motion of the defendants that said monies be used for the payment of taxes is denied by the Court." On May 28 following, the court duly made, and there was filed on May 29, and entered, a judgment ordering the money "be paid and delivered over to plaintiffs," and directing the county auditor and the county treasurer to pay the same to counsel for plaintiffs.

[1] We must assume, from the directions given in the judgment, that the clerk of the court, on receiving the money on deposit, in turn deposited it with the county treasurer. In order to secure payment, it was therefore necessary for the court to make proper orders for payment. The minutes of the clerk are silent as to any directions. The duty imposed on the clerk of the court to "enter a synopsis of all orders, judgments, and decrees proper to be entered, unless the court shall order them to be entered at length" (Pol.Code, § 4178), and the fact that the clerk has done so will not prevent the subsequent entry of an order signed by the judge. Bailey v. Superior Court, 215 Cal. 548, 552, 11 P.(2d) 865. The appeal now here was therefore properly taken from the "order and judgment made on or about the 28th day of May, 1935," the order just recited.

Respondents would have us hold that the appeal was taken too late. We are not furnished with the date when the notice of appeal was actually filed in the court below, but, from the date it bears and the date on which respondents say it was served on them, we will assume it was filed on July 24, 1935, which date was well within the 60-day period after May 28 or 29.

[2] The second ground advanced by respondents for a dismissal, that, after the appeal was taken, a motion made by respondents to terminate the proceedings in the lower court for the preparation of a record on appeal was granted, needs no consideration. We have examined the transcript filed here by appellants, and find enough therein duly authenticated by the clerk of the lower court to permit appellants to prosecute an appeal on the judgment roll.

The motion to dismiss the appeal from the judgment and order of May 28, 1935, is denied.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; NOURSE, Justice pro tem.

PACIFIC GREYHOUND LINES, etc., v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, etc.

Civ. 10638.

Supreme Court of California.

Oct. 18, 1937.

In Bank.

PER CURIAM.

The denial of a petition for hearing in this case is not intended to be and should not be taken as a ruling as to whether the plaintiff in the pending action did or did not waive her rights under subdivision 1 of section 1881 of the Code of Civil Procedure (as amended by St.1933, p. 1479).

The petition for a hearing is denied.

---

23 Cal.App.2d 295

McCUNE v. McCUNE et al.

Civ. 5923.

District Court of Appeal, Third District, California.

Oct. 26, 1937.

1. Estoppel 🔑48

If property is sold as the grantee's at an execution or judicial sale, the grantor is not estopped by his covenant from purchasing at the sale and asserting the title thus acquired against the grantee.

2. Estoppel 🔑48

Where, after grantee reconveyed lot to grantor and his minor sister, reserving a life estate, a judgment was recovered against grantee who then permitted deed to her to be recorded and placed a mortgage upon the property, the title acquired for the grantor from purchaser at execution sale of grantee's interest did not inure to benefit of beneficiary of mortgage given by the mother and the grantor was not estopped from denying title in mother and defeating claim of beneficiary of mortgage, since the after-acquired title was an independent title.

◆

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Alfred W. McCune against Alma McCune, E. Avery Crary, and others. From the judgment, Arthur W. McCune and E. Avery Crary appeal.

Reversed, with directions.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellant Alfred W. McCune.

E. Avery Crary, of Los Angeles, in pro. per.

Carroll Allen, of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from that portion of a judgment decreeing that E. Avery Crary is the owner in fee simple of an undivided eleven-seventeenths interest in certain real property situated in the county of Los Angeles, subject to a mortgage of Carroll Allen in the sum of $800, together with interest and attorney fees.

The action was commenced by appellant Alfred W. McCune and his sister, Marie

Menard McCune, a minor, by her guardian ad litem, against Alma McCune, Carroll Allen, the holder of the mortgage in question, and certain others.

The record discloses that on March 12, 1932, Alfred W. McCune and Marie Menard McCune, then a minor, conveyed the lot in question to their mother, Alma McCune, who, on the same day reconveyed eleven-seventeenths interest in this property to Alfred W. McCune and six-seventeenths to Marie Menard McCune, reserving a life estate therein to herself. It is alleged in the complaint that it was not the intention of the parties to these transfers that the various deeds be recorded, but nevertheless Alma McCune, without the knowledge or consent of her grantors, permitted the deed conveying title to her to be recorded December 15, 1932. On January 13, 1933, Alma McCune placed a mortgage upon the property in the sum of $1,000 in favor of E. H. Pell, as trustee for Carroll Allen. Before the mortgage of Alma McCune had been executed and prior to any recordation of any deed of transfer, L. S. Trigg brought suit against Alma McCune, and on March 24, 1932, recovered a judgment against her in the municipal court in Los Angeles.

Thereafter this property was sold to satisfy the judgment at a marshal's sale and the interest of Alma McCune was purchased at said sale by L. S. Trigg. On January 21, 1935, E. Avery Crary purchased from Trigg, for a valuable consideration, the interest of Trigg in this property, which was, on the same day, conveyed by Trigg to Crary by a quitclaim deed.

Upon these facts the court concluded the judgment lien of Trigg attached to all the interest of the defendant Alma McCune in said real property and held the said judgment lien was prior and paramount to the lien of the mortgagee E. H. Pell, trustee for Carroll Allen, and that the title to the real property vested in Trigg under and by virtue of the sale under execution.

The court further concluded that the after-acquired title of Alfred W. McCune, which was purchased by E. Avery Crary for the benefit of McCune, inured to the benefit of Alma McCune, grantee of Alfred W. McCune, and that McCune was estopped from denying title in defendant Alma McCune, and was estopped as a matter of law and equity from defeating the claim of defendant Carroll Allen.

It is the contention of appellants that the foregoing conclusions are not supported by the findings of fact and are against law. With these contentions we agree. There is no question but that the deed from Alma McCune to Alfred W. McCune and his sister to the property herein involved was not recorded at the time Alma McCune executed the note and mortgage in favor of Pell as trustee for Allen. And it is also true that at the time of the execution of the mortgage McCune might have been estopped from asserting any title he might have had at that time in the property, but now, two years subsequent to the execution of the note and mortgage, the title had changed.

[1, 2] When L. S. Trigg became possessed of good title to the property by virtue of his purchase at execution sale he had the right to sell and dispose of the same to any purchaser for value, and the conveyance from him to Crary, as agent for McCune, conveyed good title, free of any fraud or misrepresentation. This was the holding in the case of Gluckauf v. Reed, 22 Cal. 468, 469, and Ervin v. Morris, 26 Kan. 664. This rule is stated in volume 21, Corpus Juris, p. 1085, § 63, as follows: "By Judicial Sale—(a) In General. If the property is sold as the grantee's at an execution or judicial sale, the grantor is not estopped by his covenant from purchasing at the sale and asserting the title thus acquired against the grantee."

Clearly the obtaining of the after-acquired title by McCune through the purchase thereof from Trigg was an independent title which he had the right to acquire and which he had the right to assert against the claim of Allen. It was no part of the transaction between the McCunes and must be construed as an independent title arising and perfected after one conveyance of good title.

Respondent Allen had the right to protect his interest by redeeming the property within the year after the execution sale but he did not see fit so to do.

We are therefore forced to the conclusion that the after-acquired title of Crary acting for McCune did not pass to Alma McCune. Crary, as agent of McCune, was not relying upon any title vested in McCune at the time of the execution of the mortgage, but was relying on a new title by virtue of a judicial sale of the right, title, and interest of Alma McCune in the property.

The judgment of the court should be reversed, and the trial court directed to enter judgment that the plaintiff Marie Menard McCune, a minor, throughout all these proceedings was, at the time of the commencement of this action and now is, the owner in fee simple of an undivided six-seventeenths interest in and to said premises, and that E. Avery Crary is now, and from the time of the execution to him of the quitclaim deed to said property by Trigg, the absolute owner in fee simple of an undivided eleven-seventeenths interest in said property, free and clear of the mortgage claim of Carroll Allen.

It is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

---

23 Cal.App.2d 245

BLISS et al. v. CALIFORNIA COOPERATIVE PRODUCERS et al.

Civ. 5857.

District Court of Appeal, Third District, California.

Oct. 21, 1937.

Hearing Denied by Supreme Court Dec. 20, 1937.

1. Corporations 🔑262(1)

Stockholders of defunct corporation were estopped to set up their failure to pay cash for stock, as required by corporation commission's permit to sell it, as defense to action to enforce their liability for corporation's indebtedness on note for money borrowed (St.1917, p. 679, § 12; Civ.Code § 3517).

2. Corporations 🔑243(10)

While estoppel cannot ordinarily be invoked to validate void contract violating law, an exception exists in creditor's action against one fraudulently holding himself out as stockholder of debtor corporation.

3. Corporations 🔑243(10)

A corporation's sole stockholders and directors, procuring from corporation commissioner duly authorized permit, pursuant to which stock certificates were regularly issued, are estopped to assert invalidity of transaction merely because of their failure to pay for stock (St.1917, p. 679, § 12).

4. Estoppel 🔑115

Plaintiffs in action to enforce stockholders' liability for corporation's indebtedness on note need not affirmatively plead estoppel of defendants to set up defense, first raised in answer, that stock was invalid because of their failure to pay therefor, but may offer evidence to rebut such defense (St.1917, p. 679, § 12).

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Charles A. Bliss and others against the California Cooperative Producers, a corporation, Walter W. Johnson, and others. From a judgment for defendants Johnson and others, plaintiffs appeal.

Reversed, with direction.

Arthur E. Miller and Charles A. Bliss, both of Sacramento, for appellants.

Charles W. White and Frederick W. Peters, Jr., both of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs brought suit upon a promissory note against the California Cooperative Producers, a defunct corporation, and upon stockholders' liability against the respondents for their proportion of that indebtedness. The trial court found that the respondents were not stockholders of the corporation at the time the indebtedness was incurred because they failed to pay for their respective shares of stock, thereby rendering the stock void and relieving the respondents from stockholders' liability under the provisions of section 12 of the California Corporate Securities Act of 1917, as it then existed. Stats.1917, pp. 673, 679; 2 Deering's Gen.Laws of 1931, p. 1934, Act 3814. Section 12 was amended in 1931 (p. 949) by section 16 of the act referred to so as to render the security merely "voidable" for failure to comply with the Corporate Securities Act in procuring a permit for the sale or transfer thereof. Judgment was accordingly rendered to the effect that the plaintiff take nothing against the respondents by this action. From that judgment this appeal was perfected.

April 21, 1927, the respondents and two other individuals who are now dead filed articles of incorporation of the California Cooperative Producers which was organized to conduct a business of canning, packing, and marketing fruit. The articles authorized the corporation to borrow money and execute notes and securities to represent the indebtedness, and to "divide a portion of its profits among persons other than its stockholders." The sole and only stockholders of the corporation, until after the indebtedness which is involved in this action was incurred, were these respondents and their two associates. Each of them held one share of stock. They were also the directors of the corporation. Johnson was the president. White was the vice-president and Powell was the secretary during that period of time. The amount of capital stock was fixed at $15,000, which was divided into 1,500 shares of the par value of $10 per share. The articles recited that "The amount of capital stock which has been actually subscribed is Fifty ($50.00) Dollars, and following are the names of the persons by whom same has been subscribed, to-wit:

Names	Number of Shares	Amount
Ben S. Allen............	One	$10.00
Henry M. Hobson.......	One	$10.00
Thos. R. White.........	One	$10.00
W. W. Johnson.........	One	$10.00
Wm. A. Powell.........	One	$10.00"

The respondents testified that they did not pay for their stock.

Numerous meetings of the corporation were held at which each of the above-named stockholders and directors attended and participated. They voted to pay themselves as directors $10 each for every meeting attended. At a meeting held May 27, 1927, they voted to authorize the president and secretary to borrow $10,000. At the last-mentioned meeting by-laws were regularly adopted and signed by these five stockholders and directors. On March 26, 1928, the corporation commissioner duly authorized and granted the corporation permission "To sell and issue 5 shares of its capital stock as herein below set forth: To sell and issue to Ben S. Allen, Henry M. Hobson, Thomas E. White, W. W. Johnson and William A. Powell an aggregate of not to exceed 5 shares of its capital stock at par for cash." On the last-mentioned date these shares were actually issued and delivered to the respective owners thereof as above specified. At a meeting held April 16, 1928, the directors voted to authorize the borrowing of $50,000 at 7 per cent. interest per annum, and to execute notes to represent the indebtedness and security therefor. The following day, April 17, 1928, the corporation borrowed from the plaintiffs the sum of $5,000, no part of which has been paid. The loan was represented by a promissory note signed by W. W. Johnson as chairman of the board of directors and R. B. Guernsey as vice-chairman. It was duly executed under the seal of the corporation and is payable in installments upon specified dates at 7 per cent. interest per annum. September 6, 1930, the corporation became bankrupt. This suit upon the promissory note was subsequently instituted. The only issue before this court is whether the respondents are relieved from stockholders' liability under the Corporate Securities Act for failure to pay for their respective shares of stock.

[1] Section 12 of the Corporate Securities Act, as it existed at the time the indebtedness was incurred, upon which the respondents rely (St.1917, p. 679), read as follows: "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by any company, with the authorization of the commissioner but not conforming in its provisions to the provisions, if any, which it is required by the permit of the commissioner to contain, shall be void."

The respondents are estopped from setting up their failure to comply with the requirement to pay cash for their stock. That defense, under the circumstances of this case, would violate the provisions of section 3517 of the Civil Code. It would encourage fraud.

Section 12 was adopted for the protection of innocent purchasers of stock for a valuable consideration, and not for the benefit of the defaulting stockholders or a derelict corporation. Eberhard v. Pacific Southwest Loan & Mortg. Corporation, 215 Cal. 226, 9 P.(2d) 302, 303; Castle v. Acme Ice Cream Co., 101 Cal.App. 94, 281 P. 396, 398. The seller of corporation stock who is guilty of a failure to procure or carry out the provisions of a valid permit therefor is estopped from setting up as a defense to an action for damages or for rescission of the stock, his failure or dereliction in that regard. In the case last cited it is said in that regard: "The seller of securities who is guilty of failure to procure the necessary statutory permit to sell and transfer the stock is estopped from setting up this defense to an action for rescission or for damages."

In the Eberhard Case, supra, which was a suit on a promissory note secured by mortgage, the Supreme Court said: "The inhibitions of the Corporate Securities Act

* * * against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense in pari delicto where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller. The fundamental maxim that 'no one can take advantage of his own wrong' (section 3517, Civ.Code), and other kindred principles, immediately recur to the mind."

Numerous cases are cited therein in support of the preceding announced principle.

It is true that innocent purchasers of stock which is void for failure to comply with the Corporate Securities Act by first procuring the commissioner's authorization therefor are not estopped from setting up the invalidity of their stock as a defense to an action against them upon proportionate stockholders' liability for the indebtedness of the corporation. Regan v. Albin (Golden Eagle Milling Co. v. Albin), 219 Cal. 357, 26 P.(2d) 475, 476. The distinction between that case and the present one is clear. In the case last cited the purchaser of invalid stock was entirely innocent of any dereliction or wrong, and he was therefore equitably entitled to assert his lack of ownership of the stock. He was not thereby taking advantage of his own wrong. In the present case the respondents were the sole stockholders, directors, and officers of the defunct corporation when they deceived the plaintiffs by their conduct and the records of the corporation into believing they were the lawful holders of one share of valid stock each in the corporation, issued in compliance with the corporation commissioner's permit which was previously procured. Their conduct in failing to pay for their stock amounted to fraud perpetrated on the plaintiffs by means of which they procured the $5,000 loan. They now seek to avoid liability therefor by testifying that they did not pay for the stock. It would be a travesty on justice and an encouragement of fraud to now permit them, under such circumstances, to escape liability by pleading their own deliberate violation of the specific provisions of the commissioner's permit to sell stock only for cash. The cases upon which the respondents rely are all distinguishable from this case by application of facts similar to those of the Golden Eagle Milling Company Case, supra, upon which the appellants chiefly rely. We are cited to no case in which it is held a valid creditor of a corporation is barred from recovering an indebtedness from purported stockholders which is incurred through the stockholders' fraud or dereliction.

[2] It is true, as stated in the Regan v. Albin Case, supra, that "an estoppel cannot ordinarily be invoked to give validity to a contract which is void through violation of law." There is, however, an exception to this rule, when the action is brought by a creditor against one who is himself guilty of fraud or deceit in holding himself out to be a stockholder.

In 11 Fletcher, Cyclopedia of Corporations, p. 365, § 5169, it is said: "As a general rule, too, the corporation, its directors and officers and stockholders participating therein are estopped to set up invalidity of the stock or certificates for noncompliance with, or violation of, the Blue Sky Laws."

[3] When the certificates of stock are regularly issued pursuant to a duly authorized permit of the corporation commissioner procured by the sole stockholders and directors of the corporation, they are estopped from asserting the invalidity of the transaction on account of their mere failure to pay for the stock. In 5 Thompson on Corporations (2d Ed.) p. 35, § 5182, it is said: "Neither can a subscriber for stock escape his responsibilities to creditors by showing that he had not paid the amount required by the charter or statute to be paid at the time of subscribing. The theory is that a stockholder cannot take advantage of his own wrong to the prejudice of others."

Under the circumstances of this case the stockholders are estopped from setting up their failure to pay for the stock.

[4] It was not necessary for the plaintiffs to plead estoppel under the circumstances of this case. When the defense of an invalidity of the stock for failure to pay for it is raised for the first time in the answer of the defendants, it is not necessary for the plaintiffs to affirmatively plead estoppel, but they may then offer evidence at the trial to rebut the asserted invalidity of the stock. First National Finance Corporation v. Five-O Drilling Co., 209 Cal. 569, 289 P. 844; McCreery v. Charlton, 185 Cal. 37, 42, 195 P. 670; Blood v. La Serena Land & Water Co., 113 Cal. 221, 41 P. 1017, 45 P. 252.

The judgment is reversed, and the court is directed to render judgment against each of the respondents, Walter W. Johnson, Thos. R. White, and Ben S. Allen, for his proportionate share of the debt due on the promissory note sued upon, to be determined as provided by law.

We concur: PULLEN, P. J.; PLUMMER, J.

23 Cal.App.2d 261

PAGONES v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11516.

District Court of Appeal, Second District, Division 1, California.

Oct. 22, 1937.

1. Workmen's compensation 🔑1114

In a workmen's compensation proceeding, the failure of the employer to present the defense of the statute of limitations prior to the submission of the cause for decision constitutes a waiver thereof (St.1931, p. 2372, § 11(h).

2. Workmen's compensation 🔑1684

Evidence in a workmen's compensation proceeding *held* to warrant the Industrial Accident Commission in concluding that the employer had actual knowledge of the injury or that he was not misled or prejudiced by the failure to give notice (St.1931, p. 2372, § 15).

3. Workmen's compensation 🔑1687

A compensation award is not secured by fraud because some one connected with the Industrial Accident Commission tells the employer, in accord with the statute, that it is not obligatory upon him to be represented by counsel (St.1917, p. 848, § 19(a).

4. Workmen's compensation 🔑1461

In a workmen's compensation proceeding against the proprietor of a café for compensation to a dancer and entertainer in which defendant contended claimant was employed by his dance director, an independent contractor, evidence *held* insufficient to show that defendant did not have authoritative control over the entertainer.

5. Workmen's compensation 🔑1349

The burden of proof as to questions relating to independent contractors is upon the employer in a workmen's compensation proceeding.

6. Workmen's compensation 🔑1710

Whether a person performing services is an employee or an independent contractor is a question of law and fact in a workmen's compensation proceeding.

7. Workmen's compensation 🔑1939

In a workmen's compensation proceeding, the finding of the Industrial Accident Commission is conclusive unless there is an absolute absence of evidence in the record so as to render such finding unreasonable (St.1917, p. 848, § 19(d).

◆

Proceedings under the Workmen's Compensation Act by Billie Hawkins, claimant, for compensation for injuries, opposed by C. J. Pagones, doing business as Bal Tabarin, alleged employer. Compensation was awarded by the Industrial Accident Commission of California, and the alleged employer brings a proceeding to review the award.

Award affirmed.

Charles E. Hobart, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent commission.

YORK, Presiding Justice.

Petitioner, the proprietor of the Café Bal Tabarin in Los Angeles, seeks by this proceeding to review findings and award made March 29, 1937, by respondent commission, wherein petitioner was held liable as an employer of respondent Billie Hawkins, a dancer and entertainer, for injuries sustained by her during a dance rehearsal, resulting in temporary total disability. Petitioner carried workmen's compensation insurance as to various persons in his employ, but it did not cover "entertainers."

It appears that seven and one-half months after the injury was sustained respondent Hawkins filed her application for adjustment of her claim for compensation. Hearing was had before respondent commission and an award was made in her favor for the sum of $1,48.20, together with reasonable value of medical expenses. Petitioner, who had theretofore appeared in person, employed counsel to present a petition for rehearing, which was denied.

Petitioner here contends, as he did in his petition for rehearing before the commission, that the commission acted in excess of its powers, in that (1) "petitioner raised as an oral defense * * * that seven and one-half months had elapsed from the time of the alleged injury to the filing of the petition"; and (2) "as an oral defense * * * stated that he had been given no notice of the alleged injury of any kind until the service of the application for compensation"; (3) that the award "was procured by fraud, in that petitioner was a foreign-born American citizen, not familiar with the American laws or customs, and because of his unfamiliarity in a proceeding before the * * * commission, relied upon advice from the office of the * * * commission, that a written answer was not necessary, independent counsel was not necessary; that all he had to do was to appear and tell his story, and the commission would protect his rights; (therefore) it would constitute a fraud upon the petitioner to charge him with technically failing to raise the statute of limitation in writing an affirmative defense, or that he had received no notice of the injury within thirty days, and particularly to deny a rehearing so that he could have had the benefit of counsel to otherwise raise, if necessary, these defenses, which were clearly his right to have raised for him."

[1] The certified record of the proceedings had before the commission does not indicate that the petitioner raised the defense of the statute of limitations, either orally or otherwise. His failure to present such defense prior to the submission of the cause for decision constitutes a waiver thereof. Section 11 (h) of the Workmen's Compensation Act (as amended by St.1931, p. 2372); Red River Lumber Co. v. Pillsbury, 174 Cal. 37, 161 P. 982. See, also, U. S. Fidelity, etc., Co. v. Pillsbury, 174 Cal. 198, 162 P. 638, and Western Pipe & Steel Co. v. Ind. Acc. Comm., 126 Cal.App. 225, 14 P.(2d) 530.

[2] As to petitioner's contention that he had no notice of the injury until service upon him of the application for compensation, although he testified that he knew nothing of the injury, the injured employee testified that she told him about it the night she was injured; that her leg was bleeding and petitioner asked her what was the reason. She also testified that Givens, the dance instructor, was teaching her and that he knew of her injury; that she quit before the end of the week and that Mr. Senders brought her salary to her and that he told petitioner that respondent Hawkins could not come back to work because of the injury to her leg.

It therefore follows that in the state of the record here shown it was within the power of the commission to conclude that petitioner had actual knowledge of the injury, which knowledge, by section 15 of the act (as amended by St. 1931, p. 2372), is made equivalent to notice, or, in the absence of such actual knowledge, that the employer was not in fact misled or prejudiced by the failure to give notice.

[3] The contention that the award was procured by fraud finds no support in the record. No showing was made at the hearing as to what petitioner might have been advised by an employee of the commission, or that he was advised he was not entitled to be represented before the commission. It is only alleged by petitioner that he was told it was not obligatory upon him to be represented by counsel. Such advice is in accord with section 19 (a) of the act (St.1917, p. 848). Certainly, by no act of the injured employee Hawkins was petitioner prevented from presenting his defense.

[4-7] Finally, it is urged that the evidence is insufficient to support the award, for the reason that the respondent Hawkins was not in petitioner's employ at the time of her injury, but was employed by an independent contractor, the dance director hired by petitioner. Respondent Hawkins testified that at the time of her injury she was "working for Mr. Pagones," and that she received her pay check from him. Petitioner testified that the dance director made the arrangements for Mrs. Hawkins' salary, and in answer to the question, "Who did you pay, Mrs. Hawkins or Givens?" petitioner replied, "I don't know. If Givens said 'Give Mrs. Hawkins $18 or $20,' I would pay her. * * * Sometimes she drew money, whatever $5, $10, and sometimes Givens collected the money and pay the show." Having read the evidence adduced at the hearing, we are of the opinion that there is nothing contained therein which is inconsistent with the existence of the right of authoritative control on the part of petitioner over the entertainers secured through Givens. The burden of proof on questions relating to independent contractors is upon the employer, and whether a person performing services is an employee or an independent

contractor "is a question of law and fact." Further, "the finding of the commission is conclusive, unless there is an absolute absence of evidence in the record so as to render such finding unreasonable." Metropolitan C. Ins. Co. v. Ind. Acc. Comm., 117 Cal.App. 369, 371, 4 P.(2d) 190, 191, citing Hillen v. Ind. Acc. Comm., 199 Cal. 577, 250 P. 570; section 19 (d), Workmen's Compensation Act. See, also, Gale v. Ind. Acc. Comm., 211 Cal. 137, 294 P. 391; York Junction T. & S. Co. v. Ind. Acc. Comm., 202 Cal. 517, 261 P. 704.

The award is affirmed.

I concur: DORAN, J.

---

23 Cal.App.2d 227

HINER v. OLSON et al. *

Civ. 5819.

District Court of Appeal, Third District, California.

Oct. 20, 1937.

Rehearing Denied Nov. 19, 1937.

1. Principal and agent 🔑103(9)

A traveling salesman, unless expressly authorized or held out as having other authority, has authority only to solicit orders and transmit same to his principal for approval.

2. Principal and agent 🔑70

A person may act at the same time as agent for two or more independent employers, either by consent or otherwise, provided his services for the respective principals do not conflict, and when that relationship toward others is not in conflict with the terms of his employment.

3. Automobiles 🔑197(7)

In action for injuries sustained when defendants' salesman negligently collided with plaintiff's automobile, fact that salesman handled drug accessories in noncompeting commodities for other companies did not exempt defendants from liability for negligence of salesman.

4. Master and servant 🔑301(4)

A traveling salesman may represent several independent employers at the same time, soliciting orders from the same prospective purchasers on the same occasion for the sales of different commodities which in no way conflict with the highest duty which he may owe to a particular employer, and under such circumstances his negligence exercised in the course of employment may render each of his independent employers liable for injuries sustained thereby.

5. Master and servant 🔑1

The essence of agency to sell, as distinguished from independent occupation of selling, is the delivery of the goods to a person who is to sell them, not as his own property, but as property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to fix the price and terms, to recall goods and to demand and receive their proceeds when sold, less the agent's commission, but who has no right to price for them before sale or unless sold by the agent.

6. Automobiles 🔑197(7)

Where drug company employed person who solicited sales by use of advertising literature, took orders for drugs upon blanks furnished him by his employer which were printed with firm name and address, and firm took orders subject to its approval, directed employee to extend credit, fixed and determined prices to be charged, paid fixed sum for use of automobile in lieu of traveling expenses, and had exclusive right to control the manner of his operations, employee was agent of the drug company which was liable for the negligence of the agent in operation of his automobile.

7. Principal and agent 🔑23(2)

The existence of an agency which is created by oral agreement may be inferred from circumstances which satisfactorily indicate its existence.

8. Automobiles 🔑244(26)

In action for injuries sustained when defendants' salesman negligently collided with plaintiff's automobile, declaration of one of the defendants that they were not employers of the traveling salesman was not binding upon plaintiff (Code Civ.Proc. § 2055).

9. Principal and agent 🔑21, 22(1), 121

Agency may not be proved by extrajudicial declarations of the alleged agent, although, when he is called as a witness, his statements regarding the nature and extent of his employment are competent.

---

*Rehearing denied 73 P.2d 945.

10. Appeal and error 🔑1051(1)

In action for injuries sustained when defendants' salesman negligently collided with plaintiff's automobile, where there was sufficient evidence to show that salesman was employed as agent of defendants, statement of agent that he was employed by a drug company was harmless.

11. Evidence 🔑75

When evidence tends to prove a material fact which imposes liability on a party, and he has it in his power to produce evidence which, from its very nature, must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, a presumption arises that the evidence, if produced, would operate to his prejudice and support the case of his adversary.

12. Automobiles 🔑244(26)

In action for injuries sustained when defendants' salesman negligently collided with plaintiff's automobile, evidence that defendants destroyed records of payments made during the week when accident occurred so that it could not be determined whether agent was working at that time with other evidence justified finding that agent was acting within course of his employment at time of accident for which his employer was liable.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Mrs. John Hiner against D. A. Olson and others. From a judgment for the plaintiff, D. Blaine Morgan, Carl O. Sampson, and Morgan & Sampson, appeal. Affirmed.

Charles V. Barfield, of San Francisco, and Gilbert H. Jertberg, of Fresno, for appellants.

C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants, with the exception of D. A. Olson, have appealed from a judgment of $3,000 which was rendered against them for injuries sustained by the plaintiff as the result of negligence on the part of Olson while he was driving his automobile incident to his employment as traveling salesman from the drug firm of Morgan & Sampson.

The chief contentions are that the evidence fails to prove that Olson was the agent or servant of the appellants or that he was acting in the course of his employment at the time of the accident.

For eight or ten years prior to the accident Olson served as commercial salesman for the wholesale drug firm of Morgan & Sampson, whose place of business is at Alameda. The employment was based on an oral agreement. Olson was given the exclusive territory of the San Joaquin and Sacramento valleys. He resided at Fresno. He devoted his entire time to selling drugs for the appellants in that territory, except that he carried certain preparations for other firms which did not compete with the line of goods sold by the appellants.

[1] Mr. Olson spent most of his time traveling in his district to sell his commodities, but usually returned to his home in Fresno over week-ends. He drove his own Buick sedan automobile. He did not carry the drugs with him, but took orders therefor on printed blanks furnished by the appellants. He held no title to the property which he sold. The name and address of the drug firm was printed on these blanks. Olson was authorized to sell goods on credit. The firm fixed the prices of all goods, and reserved the right to accept or reject the orders for goods and the applications for credit. In 2 Corpus Juris 593, § 229, it is said: "A traveling salesman or drummer, unless expressly authorized or held out as having such authority, has authority only to solicit orders and transmit the same to his principal for approval."

The appellants advanced to Olson the sum of $5 per day for hotel expenses while he was away from home, in addition to $10 per day which they allowed in lieu of operation and maintenance costs on his machine. He was paid each week from 5 per cent. to 10 per cent. commissions on all accepted sales which he secured. He received approximately $220 per month for his services. In response to the question "Mr. Olson solicited orders as the business agent for you, did he not?" the defendant Mr. Sampson replied, "Just drug business."

Friday, October 19, 1934, Olson was returning from a business trip in the northern part of the San Joaquin valley. He had passed through Modesto and Turlock going toward his home at Fresno. He reached Merced late in the afternoon. He parked his car at the curbing in front of the Woodworth building. The Valley Drug Store and the Maze Drug Store were regular customers of his at Merced, but it does not appear that he solicited sales from them on that day. It does appear that he drank freely from a bottle of whisky before he reached Merced. He had also taken three or four tablets the previous night to enable him to sleep. The appellants knew he was accustomed to drink to excess occasionally. They talked with him about that subject after the accident occurred.

At about 4:30 that afternoon the plaintiff's automobile was parked in front of the Woodworth building in Merced near the Olson car. The plaintiff and her daughter were about to enter their machine. Mrs. Hiner had opened the left-hand door. She stood on the running board with her hand on the steering wheel, when, without warning, Olson suddenly backed with great force into her car. Her automobile was repeatedly bumped and shoved from its position at the curbing out into the street. She was knocked from the running board and thrown upon her back on to the paving. She was seriously injured by the fall. Mr. Olson handed his business card to Howard Bunnell, who observed the accident. Olson then left Merced going toward his home. He arrived at Madera about 6 o'clock, where he was arrested on account of another accident in which his machine struck a gas station.

This suit was commenced in February, 1936. Olson's services with the appellants were terminated by them at about that time. Both Olson and the appellants were served with process. Judgment by default was rendered against him. He was not present at the trial. Upon jury trial a verdict of $3,000 was returned against the defendants. A joint and several judgment for that sum was accordingly rendered against them. From that judgment the defendants, with the exception of D. A. Olson, have appealed.

It is not contended the judgment is excessive.

The defendant D. A. Olson who caused the automobile accident in Merced was definitely identified as the man who was employed by the appellants to sell their drug compounds by means of his business card which was handed to Bunnell at that time, and by securing his name from the motor vehicle department as the owner of the machine from which the number had been taken at the time of the accident.

[2, 3] The fact that Olson handled drug accessories for companies other than that of the appellants at the time of the accident does not exempt the appellants from liability for his negligence under the circumstances of this case. It appears that Olson's services as salesman for the appellants' drug compounds in no way interfered with his occupation or duties in soliciting sales of noncompeting commodities for other companies. These other companies might also become jointly liable for his negligence on that occasion provided he was also engaged in soliciting sales for them. They are, however, not parties to this action. No motion was made to join them as party defendants.

A person may act at the same time as agent for two or more independent employers, either by consent or otherwise, provided his services for the respective principals do not conflict, and when that relationship toward others is not in conflict with the terms of his employment. Rosander v. Market St. Ry. Co., 89 Cal.App. 721, 735, 265 P. 541; Goss v. Pacific Motor Co., 85 Cal.App. 455, 456, 259 P. 455; 1 Restatement of the Law, p. 498, § 226. In the authority last cited it is said in that regard: "A person may be the servant of two masters, not joint employers, at one time as to one act, provided that the service to one does not involve abandonment of the service to the other."

[4] It is apparent that a traveling salesman may represent several independent employers at the same time, soliciting orders from the same prospective purchasers on the same occasion, for the sales of different commodities which in no way conflict with the highest duty which he may owe to a particular employer. Under such circumstances, his negligence exercised in the course of such employment may render each of his independent employers liable for injuries sustained thereby.

[5-8] We are of the opinion the evidence in this case indicates that Olson was engaged as the agent or servant of the appellants in soliciting sales in the San Joaquin and Sacramento valleys of drug compounds and accessories in their behalf. He had been working regularly for them in that district in that capacity for eight years. The circumstances of this case appear to clearly distinguish their relationship from that of an independent occupation. In 1 Mechem on Agency (2d Ed.) p. 30, § 48, re-

citing the circumstances indicating the relationship of agent or servant as distinguished from an independent occupation of selling personal property, it is said: "The essence of agency to sell [personal property] is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to fix the price and terms, to recall the goods, and to demand and receive their proceeds when sold, less the agent's commission, but who has no right to a price for them before sale or unless sold by the agent."

In the present case the circumstances indicating a relationship of master and servant or principal and agent between Olson and the appellants are much stronger in favor of the existence of an agency. The goods were not delivered to Olson for sale. He held no title to the goods. He merely solicited sales by the use of advertising literature. He took orders for the drugs upon blanks furnished to him by his employer, upon which were printed their firm name and address. These orders were subject to the appellants' approval. They directed him to extend credit upon such sales. They fixed and determined the prices to be charged. They limited his territory. They paid his hotel bills while he was on the road soliciting sales. They paid him a fixed sum in lieu of his automobile operating and maintenance expenses. They merely paid him agreed commissions on the sales which he secured. They employed and discharged him. In fact, they undoubtedly had the exclusive right to control the manner of Olson's operations in their behalf in every respect, except that he was at liberty to solicit trade in his allotted district at any time on any day when he desired to work and he did use his own machine. The existence of an agency which is created by oral agreement may be inferred from circumstances which satisfactorily indicate its existence. 21 R.C.L. 820, § 6; 1 Cal.Jur. 716, § 21. We are of the opinion the circumstances of this case adequately support the implied finding of the jury that the relationship of principal and agent or master and servant existed between the appellants and D. A. Olson at the time of the accident. The plaintiff was not bound by the declaration of the defendant Sampson that they were not employers of the traveling salesman, Olson. Section 2055, Code Civ. Proc.

The cases of Crouch v. Gilmore Oil Co., Ltd., 5 Cal.(2d) 330, 54 P.(2d) 709, and Counihan v. Lufstufka Bros. & Co., 118 Cal. App. 602, 5 P.(2d) 694, upon which the appellants rely, are not in conflict with what we have previously said regarding the evidence of agency. Those were both appeals from orders granting motions for nonsuit. Those cases do contain some circumstances similar to the facts in the present case. But they do not contain all of the circumstances of this case which furnish persuasive evidence that the defendants held the exclusive right to control the actions of their commercial traveler in all respects except the time when he was required to work, and the fact that he drove his own car. In this case the defendants did assign and limit his territory; they did pay his operating expenses; they fixed the prices of their commodities and dictated the terms of sales. From the circumstances of this case, the jury certainly had the right to infer that he was acting as the agent and servant of the appellants. With this province of the jury, under such circumstances, we may not interfere on this appeal.

[9, 10] It was not reversible error to have permitted the witness Irma Keil, over the objection of the defendants, to testify to the extrajudicial statement of the absent defendant, Olson, that he said to Mr. Bunnell immediately after the accident occurred that "He was D. A. Olson of Fresno, that he was employed by a drug company." The identity of Olson as the traveling salesman who was involved in the accident was otherwise fully established by evidence from the motor vehicle department that he was the owner of the car which bore the number taken from his machine at the time of the accident. In fact, his business card identified him. There is no doubt of his identity. Moreover, the objectionable statement does not declare that he was employed by the defendants' drug firm. He merely said he was "employed by a drug company." It will be recalled that he represented other drug companies. The word "employed" should not be given undue emphasis. We are of the opinion that statement was harmless.

It is true that an agency may not be proved by extrajudicial declarations of the alleged agent, although, when he is called as a witness, his statements regarding the nature and extent of his employment are competent. It is said in Kast v. Miller & Lux, 159 Cal. 723, at page 728, 115 P. 932, 933: "While the rule is well established that the testimony of an agent sworn as a witness in a case when the question of his agency is involved is competent to establish it and its extent and nature, as any other witness, it is equally as well established that extrajudicial statements or declarations in pais of one assuming to act as agent are inadmissible and incompetent to establish the fact of agency."

We are of the opinion the existence of the agency was satisfactorily established in this case by the surrounding circumstances, independently of the foregoing extrajudicial statement of Olson, and that this ruling was therefore harmless.

The most serious question in this case is whether the traveling salesman was acting in the course of his employment at the time of the accident. It may not be questioned under the circumstances of this case that Mr. Olson may be deemed to have been acting in the course of his employment as traveling salesman while he was driving to and from his work. To reach his prospective purchasers in his district and to return home were necessarily incident to his employment. In support of the implied finding of the jury that he was engaged in the course of his employment at the time of the accident, it appears from the evidence, together with the reasonable inferences therefrom, that immediately prior to the accident he had been canvassing the northerly portion of his assigned district to sell drugs for the appellants; it was the week-end, and he was returning to his home at Fresno; he had passed through Modesto and Turlock before he reached Merced, where he stopped, and where he had regular drug customers; after the accident he continued on his way to Fresno, reaching Madera about 6 o'clock that evening; his entire time was devoted to soliciting trade in his district, except over the week-ends; he earned and was paid by appellants an average of $220 per month; in an effort to show that he was then engaged in the course of his employment and that he had then been soliciting orders for his employers, the defendant Sampson was asked on cross-examination for their correspondence with Olson during that period, and replied that the correspondence had been destroyed. This colloquy occurred:

"Q. You could get it [the correspondence]? * * * A. Not during this [that] year, these records are destroyed. * * *

"Q. You have in your files, records of the payments for the week involved here, October 19th, 1934, have you not? A. Not today, no sir.

"Q. You had them prior to the time that they were destroyed? A. Yes sir."

[11, 12] It may or may not be true that the defendants' records showed that Olson actually forwarded to them orders for drugs secured by him from customers in his district on that very expedition during the week when this accident occurred. Every presumption indicates that he was actually returning from a business trip in the northern part of his district. Evidence peculiarly within the control of an adverse party which is willfully suppressed, is deemed to be prejudicial to his cause. In 10 California Jurisprudence, p. 779, § 86, it is said: "When the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which, from its very nature, must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, a presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary."

While the evidence in this case that the traveling salesman was actually engaged in the performance of services for the appellants at the time of the accident are not strong, we are of the opinion the circumstances furnish substantial evidence of that fact sufficient to support the implied finding of the jury in that regard.

The judgment is therefore affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

23 Cal.App.2d 298

BREZNIKAR et al. v. T. J. TOPPER CO. et al.

Civ. 10348.

District Court of Appeal, First District,
Division 1, California.
Oct. 28, 1937.

1. Malicious prosecution 🔑47

Store purchasers were entitled to reasonable damages for sellers' malicious attachment of purchasers' bank account, garnishment of accounts due them, writing of letters advising their debtors to withhold payments until termination of legal proceedings subsequently brought against purchasers, and illegal removal of merchandise from store after seizure thereof under writ of replevin, though their complaint erroneously alleged that writ of attachment was levied on store.

2. Dismissal and nonsuit 🔑42

A dismissal of action by clerk on plaintiff's written request, as distinguished from judgment of dismissal by court pursuant to parties' stipulation, is deemed to be without prejudice to further litigation of matters involved, in absence of exceptional circumstances showing the contrary (Code Civ. Proc. § 581, subd. 1, as amended by St.1933, p. 1868).

3. Dismissal and nonsuit 🔑29

A dismissal of action by clerk on plaintiffs' written request did not operate as retraxit, barring plaintiffs from bringing another action, as matter of law, especially where plaintiffs' attorney testified that it was understood at time of such request that dismissal would be without prejudice (Code Civ.Proc. § 581, subd. 1, as amended by St. 1933, p. 1868).

4. Sales 🔑476

The makers of note for purchase price of store were not in default when attachment and replevin actions against them were commenced by payees, where payments theretofore credited thereon by latter aggregated more than amount of principal then due thereon, though portion of such payments consisted of moneys raised by payees' refinancing of customers' contracts, assigned to payees by makers, in view of provision in conditional sale contract that moneys so raised should be credited on note.

5. Evidence 🔑445(2)

Testimony that sellers of store agreed to and did accept customers' contracts, assigned to sellers by purchasers, in payment of purchase-money installments under written conditional sale contract not limiting source of such payments, was not inadmissible as varying, altering, or contradicting terms of written agreement.

6. Malicious prosecution 🔑64(2)

Evidence, in action for damages from commencement of attachment and replevin suits against plaintiffs, *held* sufficient to support findings of lack of probable cause therefor and maliciousness of defendants' activities in connection with closing of plaintiffs' business.

7. Malicious prosecution 🔑69

A jury's allowance of $15,000 compensatory damages for malicious commencement of attachment and replevin suits and closing of plaintiffs' store business was so grossly excessive as to show prejudice and passion, where plaintiffs invested less than $5,000 in business, withdrew approximately same amount therefrom, ran steadily into debt after acquiring business, owed defendants $763 for goods purchased and were delinquent in payment of rent for store (Civ. Code, § 3359).

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by John E. Breznikar and another against the T. J. Topper Company, a corporation, T. J. Topper, and others. From a judgment for plaintiffs against named defendants, the latter appeal.

Reversed and remanded, with directions.

Erwin C. Easton and George M. Mason, both of San Francisco, for appellants.

Jesse E. Nichols, of Oakland, and Clarence E. Todd, of San Francisco, for respondents.

KNIGHT, Justice.

A jury awarded damages in the sum of $15,000 against the defendants T. J. Topper Company, a corporation, and T. J. Topper, in an action growing out of the sale by the Topper Company to plaintiffs of a business in Oakland, it being alleged by plaintiffs in substance that about nine months subsequent to the sale said defendants committed certain malicious acts against plaintiffs, including the commencement of two unfounded lawsuits, the purpose and effect of which was to destroy the good will of said business and ruin the business standing and credit of plaintiffs. Judgment was entered in accordance with the jury's verdict, and, following the denial of defendants' motion for new trial, defendants appealed from the judgment. The principal grounds urged for reversal are insufficiency of evidence, errors of the trial court in ruling on the admissibility of evidence, and excessive damages.

The evidence is conflicting on some points, but in the main the following are the transactions which led up to the commencement of the present action: The Topper Company had been in existence many years. It was organized by T. J. Topper, and he was its president and controlled its operations. The company was engaged in the business of selling restaurant equipment and supplies, in carrying on which it operated two stores, the principal one being in San Francisco and the other in Oakland. The respondent Breznikar had been employed as the manager of the Oakland establishment for about four years preceding November 9, 1931; and on that date said company, acting through Topper, sold the Oakland establishment to Breznikar and the respondent Corbett for $8,000, under a conditional sales contract upon which respondents made a down payment of $2,000 in cash, and they agreed to pay the balance of $6,000 in monthly installments of $100 each. Respondents were permitted to continue the business under the name of the Topper Company, and Topper kept in close touch with its operation and advised respondents concerning its management. From time to time following the sale respondents purchased quantities of merchandise on credit from the Topper Company, and in March, 1933, they owed said company therefor on an open book account approximately $6,000, the payment of which appellants were demanding; whereupon a written agreement was entered into between the parties pursuant to the provisions of which respondents gave to said company their promissory note for $6,000, payable in monthly installments of $100 each, until May 15, 1934, at which time the entire balance was to fall due. Conforming also to the terms of said agreement respondents delivered to appellants four outstanding sales contracts theretofore obtained by respondents from customers, so that as provided in said agreement appellants might refinance the same and apply the proceeds as payments on said note. On December 21, 1933, appellants sent letters to several of respondents' debtors to the effect that appellants had instituted legal proceedings against respondents and advising said debtors to withhold all payments due respondents until the termination of the litigation or to transmit the same direct to appellants. As a matter of fact, at the time these letters were sent, no legal proceedings had been instituted, but two days later, and on December 23, 1933, the Topper Company did commence suit against respondents on the $6,000 promissory note and obtained a writ of attachment which it caused to be levied on respondents' bank account and also upon some thirteen outstanding accounts due respondents from their customers. Five days later, and on December 28, 1933, said company, acting through Topper, commenced another action against respondents in claim and delivery to repossess the merchandise sold to respondents under the agreement of sale of November 9, 1931; and on the day the action was filed the sheriff, acting under the authority of the writ of replevin and pursuant to directions from Topper, took possession of the Oakland store. Thereupon respondents, according to their testimony, immediately phoned Topper to ascertain the meaning of the proceeding, and in response Topper appeared at the store, demanded the keys, and told respondents that they "were all through, to get out." Respondents complied with Topper's demands, and, as soon as they left the premises, the sheriff, acting under written instructions from Topper and his attorney, released the store and Topper took possession; whereupon he closed the store, placed a sign on the front door reading: "Closed for inventory. Open January 2, 1934. For information call Market 7561" (which was the San Francisco phone number of the Topper Company); and within a day or two thereafter proceeded to remove by truck some of the merchandise from said store.

Claiming that they had not defaulted in the payments called for by the agreement of sale or the promissory note, respondents on January 9, 1934, filed suit against appellants wherein they asked for damages, injunctive relief, and the cancellation of the agreement of sale, and of the promissory note. The injunctive relief sought was that appellants be restrained from prosecuting the attachment and replevin lawsuits, and from annoying, harassing, and "persecuting" respondents. Meanwhile the owner of the premises attached the store for rent, and respondents' numerous other creditors began pressing them for money, so that as a consequence respondents were obliged to make a complete assignment of their business to the Oakland Credit Men's Association, for the benefit of their creditors. Thereupon the Topper Company, in order that it might participate in the liquidating dividends, dismissed the attachment and replevin suits against respondents; and respondents, under circumstances about which there is a dispute, delivered to said credit association a dismissal of their action for damages and injunctive relief against appellants. Thereafter the present action for damages was instituted.

The fourth amended complaint, upon which the case was tried, contained three causes of action, stated separately. The first was for the damages respondents claimed to have sustained by reason of the attachment suit, the mailing of said letters to respondents' customers, and the removal from the store by Topper of some of the merchandise. The second was for the damages they claimed to have suffered as the result of the replevin suit; and by the third (with which we are not concerned because it was dismissed by respondents during trial) recovery was sought against the sureties on the undertaking given in the attachment suit.

[1] In the first cause of action it was alleged, among other things, that the writ of attachment was levied on the store. Admittedly, however, such was not the fact. It was seized under the authority of the writ of replevin, and, in view of this situation, appellants contend, first, under the heading that the evidence is legally insufficient to support the verdict, that respondents "submitted no proof * * * under the first cause of action." As above stated, however, the demand for damages under the first cause of action was not confined to the allegations concerning the attachment of the store. It included also damages accruing as the result of the attachment of respondents' bank account, the garnishment of some thirteen outstanding accounts due them, the writing of the letters to respondents' debtors prior to the commencement of any suit, and the alleged illegal removal from the store by Topper of part of the merchandise therein, all of which respondents claimed contributed to the loss of their business, stock in trade, good will, and credit. It is evident, therefore, that if as respondents alleged and the jury found, the various additional acts thus complained of were malicious, respondents were entitled to reasonable damages resulting therefrom, regardless of the erroneous allegation as to the attachment of the store.

[2, 3] Appellants next contend that, respondents having dismissed their first action they were barred from bringing the present one; that such dismissal operated as a retraxit or a dismissal with prejudice. This contention is based upon the proposition that the dismissal was for a consideration, towit, a release by the creditors, including appellants, of any claims against respondents. As pointed out in the case of Lamb v. Herndon, 97 Cal.App. 193, 275 P. 503, however, there is a marked distinction between a judgment of dismissal entered by a trial court pursuant to a stipulation entered into by the parties in open court and a dismissal entered by the clerk pursuant to the written request therefor filed by the plaintiff under the authority granted by subdivision 1 of section 581 of the Code of Civil Procedure, as amended by St.1933, p. 1868. In the former case it is held generally that the judgment of dismissal by the court operates as a bar to further litigation of the matters involved; whereas in the latter case, in the absence of exceptional circumstances showing to the contrary, the dismissal is deemed to be without prejudice. Here the dismissal was of the latter kind. Moreover, affirmative and positive testimony was given by respondents' attorney to the effect that prior to and at the time of the delivery of the written request for dismissal it was distinctly understood that such dismissal would be without prejudice. We are of the opinion, therefore, that under the circumstances stated it cannot be held as a matter of law that the dismissal operated as a retraxit.

[4] The remaining points urged by appellants concerning the question of their liability for damages relate to the legal sufficiency of the evidence to support the claim of respondents and the conclusions reached by the jury and the trial court that there was a lack of probable cause for the institution of the attachment and claim and delivery actions, and that the commencement of the same and the commission of the other acts charged were prompted by a malicious motive. And the determination of the first issue depends upon the question of whether at the time of the commencement of said actions defendants were in default in the payments called for by the promissory note and the conditional sales contract.

The promissory note was dated March 14, 1933, and was in the usual form, providing for the payment of $6,000 in monthly installments of at least $100 up to May 15, 1934, at which time the entire balance fell due. Therefore, on December 23, 1933, when the attachment proceeding was filed, the total amount of accrued principal on the note, according to its terms and provisions, was $900. But admittedly up to the time the action was filed appellants had credited respondents with payments on said note aggregating $3,415.16, and it was so affirmatively alleged in the complaint filed by appellants in the attachment suit. Appellants contend, however, that, inasmuch as approximately $2,900 of said payments were made up of moneys raised from the refinancing of customers' contracts, and that less than $500 was paid by respondents, respondents were in default in their payments. Obviously, this contention cannot be sustained, because there is nothing in said note excluding the application of the proceeds derived from said contracts as payments on the note; and, to the contrary, it was expressly provided in paragraph 3 of the agreement pursuant to which the note was given that "Whatever moneys parties so raise (on said contracts) shall be immediately credited on said second parties' said note." Appellants call attention to the following provision in paragraph 2 of said agreement: "That the said note is to represent and be the sole method by which the indebtedness of the second parties to the first parties shall be paid, except as hereinafter conditioned." But manifestly there is nothing in this provision which is inconsistent with the clear provision of paragraph 3; and, moreover, up to the time of filing the attachment proceeding, appellants evidently found no inconsistency between the two provisions, because on the books of the appellant company respondents were given credit on the note for the amount of the proceeds received from the refinancing of said contracts.

[5] With respect to the conditional sales contract, the evidence shows that respondents made the regular monthly payments called for therein from November 9, 1931, the date of the execution of the agreement, up to the time of the execution of the second agreement and the promissory note in March, 1933, and that thereafter during the ensuing nine months and up to the time of the commencement of the replevin action in December, 1933, appellants collected more than the accrued sum of $900 due thereon from customers' contracts other than those mentioned in the March, 1933, agreement; and, as shown by the books of the appellant company, the collections so made were credited by appellants as payments on the conditional sales contract; hence nothing was due thereon at the time of the commencement of the replevin suit. At the trial, however, appellants objected to the testimony given on behalf of respondents as to the understanding had between the parties concerning the application of the proceeds received from said customers' contracts to the payment of the monthly installments of said agreement upon the ground that said testimony tended to alter, vary, and contradict the terms of the written agreement; and they now assign as error the trial court's ruling admitting such testimony and the giving of three instructions bearing upon the question of the application of such payments. We are of the opinion that the ruling of the trial court and the instructions complained of were proper. As suggested in effect by the trial court, there was nothing in the agreement limiting the source from which the monthly payments should be made, and the testimony showing that appellants subsequently agreed to and did in fact accept customers' contracts as payment thereof did not in any manner vary, alter, or contradict the terms of the written agreement.

[6] The evidence, although conflicting, shows also that just preceding the commencement of said lawsuits Topper held several conversations with respondents, insisting that the Oakland store be closed; that the stock be moved to the San Francisco store; and that respondents be employed there at a fixed salary. It further shows that respondents refused to accede to his demands, and that eventually Topper told them that, if they did not do "as he wanted," he would "smash" their business; that he would "break" them; and that immediately afterwards they were served with the papers in the replevin suit. In view of the foregoing, we conclude that the evidence is legally sufficient to support the implied findings of the jury and the trial court that there was a lack of probable cause for the commencement of said actions and that the activities of appellants in connection with the closing of the business were malicious.

[7] However, we are convinced that, as appellants contend, the allowance of $15,000 damages was so grossly excessive as to

show that the jury in fixing the amount was influenced by a feeling of prejudice and passion. The matter of punitive damages is not involved, compensatory damages alone being sought, the amount of which must, of course, be reasonable and not so disproportionate to the damage suffered as to be contrary to substantial justice. Civ.Code, § 3359. The evidence introduced on this issue is quite voluminous, involving a mass of calculations and accounts, and it would be quite impracticable to narrate the same in detail. Summarized, the essential facts appearing therefrom describe the situation to have been as follows: The total amount of money put into the business by respondents was in round figures less than $5,000, which consisted of the down payment of $2,000, sixteen monthly installments of $100 a month, and about $1,100 collected by appellants from respondents' customers and applied on the agreement of purchase. But during the twenty-five months respondents operated the business they drew therefrom approximately $5,000, at the rate of about $100 a month each; and, after acquiring the business, they continued to run steadily in debt. In other words, when they acquired the business in November, 1931, they owed but $6,000, which represented the balance due on the purchase price; whereas a little more than two years later, when they made the assignment to creditors, their total liabilities amounted to approximately $11,500, which included delinquent rent and an indebtedness of some $2,800 due numerous creditors other than appellants. True, respondents turned over assets consisting of stock in trade and accounts receivable, which they estimated to be of the value of $13,000. But that such estimate was exorbitant is clearly demonstrated by the fact that, although the creditors themselves liquidated the business, they received only 40 cents on a dollar, or less than $4,700. Furthermore, the evidence shows that in the agreement of March, 1933, respondents agreed that thereafter they would pay appellants cash for all goods purchased from appellants, and that during the succeeding nine months they ran up an unpaid indebtedness therefor in the sum of $763; also that during those nine months two checks of $100 each given by them to appellants were refused payment by the bank on account of insufficient funds, and that at the time of the assignment they were delinquent in the payment of the rent for the store. It would seem, therefore, that in view of all of the foregoing facts the estimate of $2,000 fixed by respondents as the loss of the good will of the business was likewise exorbitant.

For the reasons stated, the judgment is reversed and the cause remanded for retrial solely upon the issue of damages, with directions to render judgment in favor of respondents and against appellants for the amount of damages so found upon a determination of that issue, respondents to recover costs.

We concur: TYLER, P. J.; CASHIN, J.

23 Cal.App.2d 269

BIRKHOFER et al. v. KRUMM.

Civ. 2133.

District Court of Appeal, Fourth District, California.

Oct. 22, 1937.

1. Appeal and error 🔑660(2)

The court reporter's statement that examination of his notes disclosed omission from his transcript of part of witness' answer to question, and trial judge's certificate that such omission occurred, constituted sufficient evidence in favor of granting motion for diminution of record on appeal to supply such omission, as against bare categorical denial thereof in affidavit of respondent's counsel.

2. Appeal and error 🔑659(3)

Appellant's motion for diminution of record to supply omission from reporter's transcript of words, "an acre," after words, "about $1500," in witness' answer to question as to value of 27½ acres of fruit land, described in trust deed securing indebtedness of $30,500, on certain date, will be granted as against respondents' claim of prejudice by foreclosure of their privilege of cross-examining witness and producing evidence contradicting his corrected testimony, where they withdrew offer to compromise their claim for $20,000 only 18 months before such date.

3. Appeal and error 🔑659(3)

The District Court of Appeal has power to grant appellant's motion for diminution of record to supply omission from reporter's, transcript of portion of witness' answer to question.

◆

Action by Oscar Birkhofer and others against Theodore Krumm. Judgment for plaintiffs, and defendant appeals.

On appellant's motion for diminution of the record.

Motion granted.

Theodore G. Krumm, and Martin J. Coughlin, both of San Bernardino, for appellant.

Ernest Clewe and Glensor, Clewe, Schofield & Van Dine, all of San Francisco, and U. F. Lewis, of Redlands, for respondents.

JENNINGS, Justice.

[1] This is a motion by appellant for diminution of the record for the purpose of supplying an alleged omission in the reporter's transcript which occurs in the answer of a witness to the following question: "What was the value of the property described in the deed of trust, a copy of which is attached to the complaint in the pending action, on the 7th of October, 1935?" The reporter's transcript shows that the answer to the interrogation was "About $1500.00." This proceeding seeks to correct the answer so that it will read "About $1500.00 an acre."

The motion is supported by an affidavit of appellant's counsel to the effect that upon reading the reporter's transcript he discovered the omission of the two words "an acre" in the above-stated answer which appeared at page 138 of said transcript, whereupon he consulted the court reporter regarding the omission and was informed by said reporter that a check of his shorthand notes showed that the omission had occurred and that affiant then called the matter of the omission to the attention of the trial judge, whereupon the said judge and the court reporter caused a supplemental page 138 to be prepared correcting the answer of the witness by supplying the omitted words. In further support of the motion a document entitled "Supplemental page 138 Reporter's Transcript" has been filed. This document shows that the answer of the witness to the aforementioned interrogation was "About $1500.00 an acre." Appended to said document is a certificate of the court reporter which states that the two words "an acre" were inadvertently omitted from the answer when the original reporter's transcript was prepared and filed and that the supplemental page 138 of said transcript is true and correct. Appended also to said document is a certificate of the trial judge to the effect that he has examined the supplemental page 138 of the reporter's transcript and found that the words "an acre" had been omitted from the answer of the witness as said answer appeared in the original reporter's transcript and said judge desiring that the transcript shall be corrected certifies that said supplemental page 138 of the transcript is true and correct.

In opposition to the motion for diminution an affidavit of one of the counsel who represented respondents and was present at the trial of the action has been filed. This affidavit states in substance that in advance of trial the attorneys for respondents had secured evidence which related to the matter of the value of the property covered by the trust deed involved in the action at the time of the sale of said property under said trust deed and had determined not to introduce such evidence unless the evidence produced by appellant should tend to show that the value of the property exceeded the amount for which said property was sold pursuant to the provisions of the trust deed and that the evidence which counsel for respondents had thus procured would have tended to prove that the value of the property exceeded the amount bid therefor by a very small sum of money, if in fact it exceeded the sum bid by any amount whatever; that the answer of the witness to the inquiry as to the value of the property as the same appears in the original transcript filed herein is precisely the answer which the witness returned and that no omission or error therefore appeared in said transcript; that affiant did not cross-examine the witness on the matter of value at the time of sale because the answer of the witness was the only evidence respecting value that was submitted by appellant; that a correction of the reporter's transcript as proposed by this motion will be prejudicial to respondents since the effect will be that respondents are deprived of the privilege of cross-examining the witness on the question of value and are further deprived of the opportunity of submitting the evidence which they had which would have contradicted the testimony of the witness and would have tended to show that the value of the property at the time of sale was approximately the amount which was bid therefor.

From the foregoing recital it is apparent that there is a direct conflict with respect to the fact of whether or not the answer of the witness was correctly reported in the original reporter's transcript. It is apparent also that the preponderance of evidence is in favor of the motion. One of the chief reasons for the presence of a phonographic reporter at the trial of an action is to insure a correct recordation of the testimony of witnesses. The frailty of human memory is so well known that one must indeed be bold to place implicit reliance upon it in opposition to the shorthand notes of a disinterested expert whose duty it is to record with meticulous correctness the oral testimony of witnesses. In addition to the statement of the court reporter that an examination of his notes disclosed the omission, there is the certificate of another disinterested observer at the trial whose function it was to hear the testimony, to make findings of fact in accordance with the facts disclosed by the evidence, and to render a judgment which in the ultimate analysis must depend upon and be supported by the evidence. In passing upon the disputed question of fact here presented we are entitled to indulge in the assumption that the trial judge listened with an attentive ear to the oral testimony submitted to him. His certificate expressly finding that the omission which this proceeding seeks to supply actually occurred has much weight.

[2] Taking the bare categorical denial of omission contained in the affidavit filed on behalf of respondents, it is clear that the preponderance of evidence is, therefore, in favor of granting the motion. However, respondents, through the medium of the opposing affidavit, have set out certain matters which, it is claimed, indicate that favorable action on the motion will be prejudicial to them on the appeal. It is declared that if the motion is granted respondents are thereby foreclosed of the privilege which they would have had of cross-examining the witness and of producing evidence which they had which would have effectually contradicted the testimony of the witness as corrected and which would have shown that the value of the property at the date of sale on October 7, 1935, was approximately the sum of money for which it was sold, which was $7,500.

Casual examination of the transcript discloses that the property whose value here assumes importance was conveyed in trust on March 27, 1928, for the purpose of securing the payment of a promissory note of the same date in the principal sum of $48,000, that in January, 1934, the principal amount represented by said note had been reduced to $30,500, that during the early part of the year 1934 certain negotiations took place between appellant and the attorneys representing respondents as a result of which respondents indicated their willingness to accept the sum of $20,000 in full settlement and compromise of their claim for $30,500. These negotiations apparently continued from the latter part of the month of December, 1933, until the offer of respondents to accept the smaller amount was withdrawn on April 30, 1934. The history of these negotiations furnishes some evidence respecting the value of the property during the period covered by the negotiations. In particular the withdrawal by respondents of their offer to compromise their claim for $20,000 on April 30, 1934, indicated a belief on their part that they had reasonable security for the debt due them. In the absence of any evidence showing a cataclysmic decline in value it is inconceivable that the value of property which was considered proper security for an indebtedness of $30,500 on April 30, 1934, would have shrunk to 5 per cent. of the amount of such indebtedness in a period of 18 months. It is placing too great a strain on credulity to yield to the intimation of respondents that when the witness stated that the value of the property on October 7, 1935, was $1,500 they understood him to mean that the figure given by him represented his opinion of the total value of the 27½ acres of land on which the evidence showed there was located an orange grove and that for this reason they carefully refrained from cross-examining the witness on the matter of value and from submitting the evidence as to value which they now declare they had assiduously collected prior to the trial of the cause. For this reason and indulging in the violent assumption that the answer of the witness was as respondents declare, their complaint of prejudice which they will suffer if the motion is granted is exceedingly unimpressive.

[3] We do not understand that it is contended by respondents that this court lacks the power to grant the motion. Such contention if made would be untenable. McMahon v. Hamilton, 202 Cal. 319, 260 P. 793; Webster v. Webster, 216 Cal. 485, 492, 14 P.(2d) 522; Keck v. Keck, 217 Cal. 280, 18 P.(2d) 338; Dugan v. Forster, 101 Cal.App. 144, 281 P. 411; Barnett v. Marsili, 122 Cal.App. 609, 10 P.(2d) 472.

The motion for diminution is therefore granted.

We concur: BARNARD, P. J.; MARKS, J.

---

23 Cal.App.2d 274

WEIGLE v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10397.

District Court of Appeal, First District, Division 2, California.

Oct. 25, 1937.

Rehearing Denied Nov. 24, 1937.

Hearing Denied by Supreme Court Dec. 23, 1937.

1. Municipal corporations 🔑220(3)

Provision in municipal charter that any compensation paid as of a certain date to an incumbent holding a position in the municipal service at that time shall not be reduced so long as the incumbent holds such position was required to be interpreted, not only in connection with the charter as a whole, but particularly with reference to that which precedes it and which it qualifies.

2. Evidence 🔑31

The District Court of Appeals has judicial knowledge of all provisions of charter of the city and county of San Francisco.

3. Municipal corporations 🔑220(3)

Provision in municipal charter prohibiting a determination of salary and wage rates which would result in a reduction in compensation of any employee who was an incumbent on January 1, 1931, below that in effect on that date, prohibited a reduction in the wage rate and hence did not apply where a municipal civil service employee suffered a reduction in his days of service.

4. Municipal corporations 🔑218(2)

Rule of municipal civil service commission providing that whenever it became necessary to reduce number of persons employed in permanent positions, persons should be laid off in inverse order of their appointment, was not violated by reduction of a municipal civil service employee's days of service, since such reduction was in the amount of employment and not in the number of employees.

5. Municipal corporations 🔑218(2)

Rule of municipal civil service commission requiring a hearing upon written charges before removal or discharge of any permanent employee was not violated by the reduction of a municipal civil service employee's days of service, since such reduction was a "suspension," not a "removal" or a "discharge."

[Ed. Note.—For other definitions of "Discharge," "Remove; Removal" and "Suspend; Suspension," see Words & Phrases.]

6. Municipal corporations 🔑218(1)

Under municipal charter authorizing municipal civil service commission to adopt rule to carry out civil service provisions of charter and to govern layoffs or reduction in force, both permanent and temporary, due to lack of work or funds, retrenchment, or completion of work, the municipality, acting through its proper officials, could lay off or reduce the period of service of its employees.

7. Municipal corporations 🔑220(8)

In action against municipality by assignee of employee, whose days of service each week had been reduced, for difference between total amount of compensation received in year prior to reduction and amount received in succeeding years, burden was on assignee to show by his pleading that, in exercising the power to reduce period of service of employees, the rules of the civil service commission were violated.

8. Municipal corporations 🔑220(8)

In action against municipality by assignee of employee, whose days of service each week had been reduced, for difference between total amount of compensation received in year prior to the reduction and total amounts received in each succeeding year, complaint was insufficient to show that municipal officials, in reducing period of service, violated any rules of the civil service commission governing the exercise of provisions of charter relating to reduction in force.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by August J. Weigle against the City and County of San Francisco, a municipal corporation. From a judgment for the defendant after a general demurrer to the complaint and amendments thereto had been sustained and the plaintiff failed to amend, the plaintiff appeals.

Affirmed.

John G. Evans and H. F. Boos, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondent.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, amici curiæ.

OGDEN, Justice pro tem.

This is an appeal from a judgment entered in favor of defendant and respondent upon the sustaining of a general demurrer to the complaint and amendments thereto, and the failure of plaintiff and appellant to amend.

The action is brought by appellant, as assignee of 75 civil service employees of the respondent city and county, and seeks to recover for alleged reductions in compensation suffered by them covering the period from January 8, 1932, to the date of filing the complaint, to wit, July 1, 1936. The complaint and amendments thereto, which will hereafter be referred to simply as the complaint, separately states the claims of each of the assignor employees. By stipulation, it is before us as to the first cause of action only, each of the other counts being identical therewith except as to names and amounts and it being stipulated that the decision upon this appeal as to the first cause of action shall apply to them all.

The following facts appear from the allegations contained in the first count of the complaint: Prior to January 8, 1932, and particularly on January 1, 1931, appellant's assignor was employed by respondent, in the capacity of bricklayer, as a regularly certified and duly qualified permanent civil service employee, on the basis of 6 days per week for a total of 44 hours per week. Although it is alleged that prior to January 8, 1932, he was receiving annual compensation of $3,300 for his services, it appears from a consideration of the pleading as a whole that he was then and still is compensated upon a per diem basis, the total amount of compensation received in each year being dependent upon and governed by the number of days of service actually performed. On January 8, 1932, by action of the respondent, his days of service per week were, and ever since have been, reduced from 6 to 5 and his hours of service per week from 44 to 40. It is alleged that this action was without cause or justification and contrary to certain provisions of the charter and rules of the civil service commission as set forth in the complaint. It further appears that no charges were filed against the employee nor any opportunity given him to be heard in defense thereof; also that at all times subsequent to such reduction there was work to be performed sufficient to require his services for the full 6 days of each week and that there have been continuously employed other civil service employees, junior in service to him, engaged in performing the services that would have been performed by him if permitted to work for the full time.

As a result of the reduction in days of service permitted to be rendered, there was a corresponding reduction in the total amount of compensation received in each of the following years, and appellant seeks to recover for the difference between the total amount of compensation received in the year prior to the reduction and the total amounts received in each of the succeeding years.

Appellant contends that his compensation was wrongfully reduced within the meaning of the prohibition found in section 71 of the charter and relies upon the following excerpt from that section, to wit: "* * * provided, that any compensation paid as of January 1, 1931, to an incumbent who legally held a position in the city and county service at that time, shall not be reduced so long as such incumbent legally holds such position. * * *"

[1] In determining the meaning of this proviso and the scope and effect of the limitation thereby imposed, however, we cannot, as appellant asks us to do, read and consider it as so isolated. It must be read and interpreted, not only in connection with the charter as a whole, but particularly with reference to that which precedes it and which it qualifies. Lewis' Sutherland Statutory Construction (2d Ed.) vol. 2, p. 670, 23 Cal.Jur. 744. As aptly stated

in Sacramento v. Industrial Accident Commission, 74 Cal.App. 386, at page 391, 240 P. 792, 794, where the word "compensation" as used in section 8½ of article 11 of the State Constitution was under consideration, "The word 'compensation' must be read in connection with, not only the words where it appears, but also in reference to the subject-matter of which the section purports to treat."

[2, 3] As we have judicial knowledge of all the provisions of the charter of respondent city and county (Clark v. City of Los Angeles, 160 Cal. 30, 116 P. 722; Teachout v. Bogy, 175 Cal. 481, 166 P. 319), we may refer to the entire section where the proviso relied upon is found. Section 71 of the charter reads as follows: "All increases in salaries or wages of officers and employees shall be determined at the time of the preparation of the annual budget estimates and the adoption of the annual budget and appropriation ordinances, and no such increase shall be effective prior to the fiscal year for which the budget is adopted. Salary and wage rates for classes of employments subject to salary standarization, as in this charter provided, shall be fixed in the manner provided in this charter. Salary and wage rates for classes of employment not subject to salary standarization, exclusive of compensations fixed by this charter, shall be recommended by the officer, board or commissioner having appointive power for such employments, and fixed by the budget and the annual salary ordinance. Pending the adoption of salary standards as in this charter provided, the salary and wage rates for positions subject to such standardization shall be as recommended by the officer, board or commission having appointing power for such positions and fixed by the budget and annual salary ordinance; provided that any compensation paid as of January 1, 1931, to an incumbent who legally held a position in the city and county service at that time, shall not be reduced so long as such incumbent legally holds such position. No compensation shall be increased so as to exceed the salary or wage paid for similar services and of like character and for like service and working conditions in other city departments or in private employments, nor so as to exceed the rate fixed for such service or position in the proposed schedule of compensations issued by the civil service commission under date of April 9, 1930, except as such proposed schedule or compensation is amended as provided in this charter, or extended by the civil service commission to include classifications not included therein."

It is apparent from a reading of the foregoing section as a whole that it deals with the manner of determining increases and reductions in salary and wage rates. The sentence in which the proviso is contained grants the power to determine such salary and wage rates, pending the adoption of salary standards, in accordance with the recommendations of the appointing power. The proviso limits the exercise of that power by prohibiting such a determination of salary and wage rates as will result in a reduction in compensation of any employee who was an incumbent on January 1, 1931, below that in effect on that date. The reduction in compensation prohibited is a reduction caused by a reduction in wage rate, not in number of hours or days of employment. Appellant complaining, not of a reduction in wage rate, but rather of a reduction in amount of employment, it follows that the prohibition contained in section 71 of the charter has no application to the situation presented by his pleading.

[4] Appellant further contends that, by reducing the number of days of service per week of his assignor, the rules adopted by the civil service commission of the respondent city and county have been violated. The first of these rules upon which he relies and has pleaded in his complaint is the following: "Rule 26. Reduction in Force. Section 2. Permanent Positions: Whenever it becomes necessary for an appointing officer to reduce the number of persons employed under his jurisdiction in permanent positions in any class, such persons shall be laid off or relieved from duty in the inverse order of their appointment in his jurisdiction and shall be entitled to such rights as are provided in section 5 of this rule."

It is apparent from a reading of the foregoing rule that it applies only to a reduction of force or in number of employees and has no application to the situation here presented of a reduction, not in number of employees, but rather in amount of employment.

[5] A violation of rule 29 of the civil service commission is also claimed. That portion of this rule which is incorporated

in the complaint is taken verbatim from section 154 of the charter and provides as follows: "Rule 29. Suspension and Dismissal. Section 1. Charter Procedure. No person employed under the Civil Service provisions of this charter, exclusive of members of the Police and Fire Departments, as provided under section 155 of the charter, in a position defined by the Civil Service Commission as permanent shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. * * *"

Appellant cites a line of decisions from the jurisdiction of Massachusetts, holding that the reduction of days of service per week of per diem employees constitutes a suspension requiring notice thereof and a hearing in accordance with civil service rules. Bois v. Mayor of City of Fall River, 257 Mass. 471, 154 N.E. 270; Whalen v. City Forester of City of Waltham, 279 Mass. 287, 181 N.E. 246; Reagan v. Mayor of Fall River, 260 Mass. 529, 157 N.E. 522. All of these cases were based upon charter provisions requiring notice and hearing in case of a suspension, while the charter provision of the respondent city and county requires charges and hearing thereon only in the event of a removal or discharge. This distinction is recognized in the case of Bois v. Mayor of City of Fall River, supra, in the following language: "The word 'suspension' in this context [referring to the charter provision] means a temporary withdrawal or cessation from public work as distinguished from permanent severance from the service accomplished by removal."

We have been able to find no provision in the charter of respondent and no rule of the civil service commission has been pleaded or called to our attention requiring charges to be filed and a hearing to be had thereon in the case of a temporary cessation or suspension from employment such as is found in the charters under consideration in the cases cited. Although the title of rule 29 above quoted refers to both suspension and dismissal, that portion of the rule pleaded and called to our attention refers only to a removal or discharge and not to a suspension.

[6-8] Section 141 of the charter authorizes the civil service commission to adopt rules to carry out the civil service provisions of the charter and to govern, among other things, "layoffs or reduction in force, both permanent and temporary, due to lack of work or funds, retrenchment, or completion of work. * * *" That the respondent city and county, acting through its proper officials, had the power to lay off, or reduce the period of service of, its employees is recognized by the foregoing section. The burden was upon appellant to show by his pleading that, in so exercising that power with reference to his assignor, the rules of the civil service commission, if any, governing such exercise, were violated. This he has failed to do and the demurrer to his complaint was therefore properly sustained.

The case of Lotts v. Board of Park Commissioners, 13 Cal.App.(2d) 625, 57 P. (2d) 215, relied upon most strongly by appellant, is readily distinguishable from the instant case. In the case cited, the council of the city of Los Angeles provided by ordinance for the creation of half-time positions in the classified service and authorized the appointing authorities to order the employment of persons on half-time basis and to reduce the compensation of such persons accordingly. The ordinance further provided that such half-time positions were to be filled by persons who had been in the service of the city for at least five years, where they were still able to render service satisfactory in quality, but where, because of advanced years or injury, such work was less than standard quantity. Certain of the employees of the park department were so placed upon half-time basis and instituted mandamus proceedings for reinstatement to a full-time basis and recovery of the reductions in compensation suffered. In determining that the petitioning employees were entitled to the relief sought, the court at page 632 of 13 Cal. App.(2d), 57 P.(2d) 215, 219, states, "We do not dispute the right of the board to reduce the salaries or the hours of labor of all park department employees within a given classification, but we think it clearly illegal and a violation of the vested rights of employees for the board of park commissioners to transfer certain employees to half-time work at a reduced salary, and permit other employees in the same grade or civil service classification to continue at full-time work, and then proceed to fill the vacated positions with other civil service eligibles." In the case before us no such discrimination as to employees in the same classification is alleged. On the contrary, the facts appear to meet the situation referred to by the court in which it concedes the right to reduce the hours of labor of civil service employees.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

WILLIAMS v. COSTA et ux.*
COSTA v. NEVES.

Civ. 5873, 5874.

District Court of Appeal, Third District, California.

Oct. 15, 1937.

Rehearing Denied Nov. 12, 1937.

Hearing Granted by Supreme Court Dec. 14, 1937.

1. Fraudulent conveyances 🔑205, 271(1)

A conveyance cannot be set aside by a creditor no matter how tainted with fraud, unless some specified property upon which creditor has a right to file his claim has by the fraudulent conveyance been placed beyond his reach, and the mere intent to delay or defraud is not sufficient, but there must also be an injury to creditor which must be affirmatively shown (Civ.Code, § 3441).

2. Deeds 🔑56(2)

A transfer of realty is not valid unless there be delivery of conveyance with intent to transfer title.

3. Fraudulent conveyances 🔑176(3)

Where ranch owner's judgment creditor purchased ranch at execution sale and thereafter executed quitclaim deed to owner's brother and satisfaction of judgment to owner in consideration of cash payment and transfer of personalty by owner, and owner executed deed to brother without consideration and without intent to transfer title, brother held ranch in trust for owner, even if owner's deed to brother was fraudulent as to creditor, and after owner's death his administrator was entitled to possession as against brother (Civ.Code, § 3441).

4. Quieting title 🔑44(2)

In action to quiet title by deceased ranch owner's administrator against owner's brother, where brother introduced deeds showing title to ranch in himself, set up his legal title, and claimed possession of ranch, administrator was entitled to show that he was the equitable owner of ranch, and that brother held title in trust for him.

5. Forcible entry and detainer 🔑14

A deceased ranch owner's brother who held ranch in trust for owner and after his death for his administrator could not maintain unlawful detainer action against lessee in possession under owner and administrator.

◆

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action to quiet title by Amos O. Williams, as administrator of the estate of Alfonso Bastos, deceased, against A. P. Costa and wife, and action for unlawful detainer by A. P. Costa against Frank B. Neves. From a judgment for defendants in the action to quiet title, plaintiff appeals, and, from a judgment for plaintiff in the unlawful detainer action, defendant appeals. The cases have been consolidated on appeal.

Judgment in both cases reversed, with directions.

C. Ray Robinson, of Merced, John H. Machado, of San Jose, and Willard B. Treadwell, of Merced, for appellants.

Edward Bickmore and Andrew R. Schottky, both of Merced, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this appeal two cases have been consolidated, an action for unlawful detainer, and an action to quiet title by the administrator of the estate of Bastos, deceased.

The facts upon which each action is based are so intermingled that one statement will cover both.

For some time prior to March, 1933, Alfonso Bastos was the owner of a ranch in the county of Merced. About that time Bastos, being in some financial difficulty with Larry Ferreira, executed to his brother A. P. Costa, a mortgage thereon for $10,000. Shortly prior to the giving of this mortgage Ferreira had filed an action against Bastos, alleging that Bastos was indebted to him in a sum in excess of $5,000. The court found, and the facts are apparently not in dispute, that Bastos received no consideration from Costa for the execution of said note and mortgage, and that these instruments were executed with the intention to delay and defraud Ferreira, the creditor of Bastos, and in the collection of any judgment he might obtain against Bastos.

---

*For subsequent opinion see 82 P.2d 600.

In November, 1933, Ferreira recovered a judgment of $5,000 against Bastos, and thereafter an execution was issued on said judgment directed to the sheriff of the county of Merced, which officer duly levied upon the ranch property of Bastos. Thereafter, and in December, 1933, the real property was sold under execution by the sheriff to Ferreira, for the sum of $500, and the sheriff's certificate of sale under said execution was delivered and duly recorded. About two months after the sale Bastos deeded said real property to A. P. Costa, which deed was duly recorded. As to this transaction, the court found that said Alfonso Bastos received no consideration for the making and execution of said deed. Some two or three months after the recording of this deed Ferreira made and executed a quitclaim deed of said real property to Costa. This deed was never recorded, but was delivered to an attorney for Bastos. The consideration for the quitclaim deed made by Ferreira was paid by Bastos by a cash payment and the transfer of certain personal property belonging to Bastos, the quitclaim deed being made by Ferreira in consideration of said cash payment and transfer of the personal property. At the same time Ferreira delivered to Bastos a full satisfaction of the judgment against him.

Prior to the foregoing, and in November, 1933, Bastos had by parol lease rented this ranch to Frank Neves, one of the defendants and appellants herein. Neves entered into possession of the property under the terms of the lease with the understanding that in March, 1934, Bastos would execute a written lease of the property for a term of five years, but during the interim Neves was to continue in possession of said property under the terms of the parol lease.

In May, 1934, Bastos died, without making any written lease to Neves, and letters of administration were issued to Amos O. Williams as public administrator, plaintiff and appellant herein. Thereafter the administrator entered into a written lease with Neves, since which time Neves has continued to occupy said premises and to pay the rents specified therein.

Thereafter Costa filed an action in unlawful detainer against Neves, the possessor of the real property. Neves in his answer denied that he had ever been a tenant of Costa and denied that Costa was the owner of or entitled to the possession of said premises.

Upon the trial, judgment in the unlawful detainer suit was entered in favor of plaintiff Costa, the court holding that Neves was guilty of unlawful detainer, and awarded judgment against defendant for unpaid rentals.

In the action to quiet title, judgment was entered in favor of defendants Costa and wife. It is from these judgments that these appeals have been taken.

Respondent contends that the judgments as entered by the trial court are fully supported by the law and the facts in the case; as to the action to quiet title it is maintained that the holder of an equitable title, such as an administrator of an estate, cannot quiet title as against the holder of the legal title, and that a resulting trust cannot be declared in favor of a plaintiff in a quiet title action where the complaint contains no allegations with reference to any resulting trust. It is also maintained that a conveyance of real property with intention to defraud creditors is valid and is effective between the parties thereto and their successors in interest.

Appellants contend that the grant deed from Bastos to Costa must prevail whether the same was fraudulent or not. Taking up their first contention, that if the grant deed was not fraudulent the appellants must prevail, they point out that Ferreira became the owner of the property by virtue of the sheriff's sale based upon the judgment recovered by Ferreira against Bastos, and that anything that Bastos may have done after Ferreira became vested with the title was not fraudulent as far as Ferreira was concerned. Ferreira became the owner of the property by virtue of the sheriff's deed in December, 1933. It was not until February, 1934, that Bastos attempted to deed this property to Costa.

[1] Section 3441 of the Civil Code provides that a creditor can void the obligation of his debtor for fraud only when the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation. A conveyance, therefore, cannot be

set aside by a creditor no matter how tainted with fraud, unless some specified property upon which he has a right to file his claim has by the fraudulent conveyance been placed beyond his reach. The mere intent to delay or defraud is not sufficient, but there must also be an injury to the creditor which must be affirmatively shown. 12 Cal.Jur. p. 976; Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am.St.Rep. 314; Sewell v. Price, 164 Cal. 265, 128 P. 407.

[2, 3] Therefore, inasmuch as Ferreira had already obtained the legal and equitable title to the property by execution on a judgment against Bastos, he was not deprived of the property, and there is nothing to show that either Bastos or Costa succeeded in placing the equity of redemption beyond the reach of Ferreira. As a matter of fact, it appears that Bastos exercised his right to redemption and paid off and satisfied the judgment of Ferreira, and therefore it is apparent that Ferreira was in no way defrauded. It is therefore obvious that, no matter with what intent this conveyance may have been made, it was not in fact fraudulent.

On the other hand, as argued by appellants, if the grant deed from Bastos to Costa was fraudulent, nevertheless appellants must prevail. It is disclosed by the evidence, and so found by the court, that Bastos and Costa were engaged in a fraudulent transaction as far as they were concerned, and it was also found that there was no intention when the transfers were made that the title to the property involved should actually pass to Costa and there was no delivery of any such documents with such intention.

It requires the citation of no authority to establish the fact that it is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title. Therefore, regardless of how fraudulent the transaction may have been between these parties, if there was no delivery with intent to transfer the title, no title would pass thereunder. The appellant, the administrator, being in possession of the property, must therefore be held to be entitled to hold such possession.

In regard to the quitclaim deed from Ferreira to Costa, the court found that Costa paid no consideration for such quitclaim deed to either Ferreira or to Bastos, but the consideration was paid by Bastos to Ferreira. Inasmuch, therefore, as Costa paid nothing for the quitclaim deed, and the consideration moved from Bastos to Ferreira, Costa is not entitled to the property, but it must be that he held the property in trust for Bastos, the party paying the consideration, and who had title thereto before said deed was executed.

These findings are all amply supported by the evidence, and there can be no doubt that the consideration for the transfer of the title of Ferreira to Costa was paid by Bastos, and that Costa became the constructive trustee for Bastos of the title to the property received by him from Ferreira during his lifetime.

[4] Respondents contend that even conceding the administrator had an equitable title, under the pleadings of this case, that is, an action to quiet title, he cannot set up this defense; that is, in an ordinary action to quiet title, a trust cannot be established.

The complaint in this action alleges that Bastos, through his representative Williams, is the owner of the property and entitled to the possession thereof and that Costa, the defendant, is claiming the same without right. Costa, upon his part, introduced the deeds showing title in himself and set up his legal title, and claimed thereby possession of the property. As against this evidence, the plaintiff was entitled to show that he was the equitable owner of the property, and that defendant held the title in trust for him. That this is the rule and has been already recognized is held in Calkins v. Calkins, 63 Cal.App. 292, 293, 218 P. 611, 614. The court there said: "The plaintiff may allege that he is the owner of the property, and that the defendant without right withholds from him its possession, and if the defendant sets up title in himself the plaintiff may be permitted to show that he is the equitable owner and the defendant holds the title in trust for him. In other words, under such pleadings the plaintiff may introduce evidence to avoid the affirmative defense and to recover, if in good conscience he ought." See, also, Marsh v. Smith, 46 Cal.App. 692, 189 P. 1037.

[5] If we are correct, therefore, in holding that Costa did not secure any interest or title in the real property, then Costa is not entitled to recover the lands from Neves. Neves dealt with Bastos

during his lifetime, and after the death of Bastos entered into a lease with the administrator and has paid all the rents reserved thereunder to the administrator. Under these facts we cannot find that Neves is guilty of unlawful detainer.

We are therefore of the opinion that, in the action to quiet title brought by Williams as administrator, the court erred in finding that Costa was the owner of the property, and in the action brought by Costa against Neves the court erred in finding defendant Neves guilty of unlawful detainer.

It is therefore the judgment of this court that judgment in both cases be reversed and that the trial court enter judgments in accordance herewith.

We concur: THOMPSON, J.; PLUMMER, J.

---

23 Cal.App.2d 255

NORTHINGTON v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 2106.

District Court of Appeal, Fourth District, California.

Oct. 21, 1937.

1. Workmen's compensation 🔑1090

Industrial Accident Commission cannot exercise powers outside those named in Workmen's Compensation Act, but act is to be liberally construed and commission is vested with wide powers to end that justice may be done in all cases (St.1917, p. 831, as amended).

2. Workmen's compensation 🔑1937

A mere error in procedure is not ground for annulling compensation award.

3. Judgment 🔑16

Jurisdiction to support judgment is jurisdiction over cause and over parties (Code Civ.Proc. § 1917).

4. Appearance 🔑19(1)
Courts 🔑24

Jurisdiction over subject-matter cannot be conferred by consent, but jurisdiction over parties may be obtained by consent where parties waive their privilege and voluntarily appear.

5. Workmen's compensation 🔑1800

Award denying employee compensation, which was substituted on rehearing for prior award granting compensation, was not subject to attack on ground that Industrial Commission was without jurisdiction to grant rehearing, on petition brought solely by State Compensation Insurance Fund, which had been released from liability by prior award, on ground that the fund was not an aggrieved party and employee had right to rely upon belief that employer was satisfied with award, where petition for rehearing advised employee that rehearing sought was one in interest of employer, and employee appeared generally, made no objection on jurisdictional grounds before rehearing was granted, and asked for affirmative relief (St.1917, pp. 873, 874, §§ 64, 65).

Proceeding under the Workmen's Compensation Act by Laura E. Northington, employee, opposed by the Patton State Hospital, Department of Institutions, employer, and the State Compensation Insurance Fund. To review an order of the Industrial Accident Commission denying compensation, the employee brings certiorari.

Affirmed.

Karl F. King and Theo. G. Krumm, both of San Bernardino, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent commission.

Carroll S. Bucher and B. E. Pemberton, both of San Francisco, for respondent State Compensation Insurance Fund.

BARNARD, Presiding Justice.

This is a petition to review an order of the Industrial Accident Commission. The petitioner, a nurse in the Patton State Hospital, was attacked by an inmate on October 5, 1933. She was given medical attention but lost no time and continued working until October, 1935, when she took a vacation followed by two leaves of absence of three months each. In April, 1936, she retired, receiving a disability allowance.

On August 6, 1936, she filed with the respondent commission an application for adjustment of claim, in which she alleged that on October 5, 1933, while employed by Department of Institutions, Patton State Hospital, she received an injury "to spine, neck and shoulders resulting in neuritis and arthritis," and that the employer's insurance carrier was "State of California." The commission set a date for hearing the application and made the State Compensation Insurance Fund a defendant. For convenience, the Department of Institutions, Patton State Hospital, will be referred to as the State Hospital, and the State Compensation Insurance Fund as the Insurance Fund. The State Hospital filed an answer which was signed by an attorney who was regularly employed by the Insurance Fund. While the Insurance Fund was included as one of the defendants in the caption, it was alleged that the State Hospital was not insured by the Insurance Fund and the answer was signed by this attorney as "Attorney for the Defendant." After a hearing at which medical and other evidence was received, the commission filed its findings under date of January 19, 1937, in which it found that the petitioner sustained an injury on October 5, 1933, arising out of and in the course of her employment, and that said injury caused permanent disability, consisting of an aggravation of arthritis and a moderate neurosis which constituted a permanent disability of 50 per cent. An award was made in favor of this petitioner with an order releasing and discharging the Insurance Fund from liability.

On February 1, 1937, the attorney who had filed the answer for the State Hospital filed a petition for a rehearing which named the State Hospital and the Insurance Fund as defendants in the caption, and was signed by the attorney as "Attorney for Defendants." The petition for rehearing begins "Comes now Defendant State Compensation Insurance Fund," but attacks the findings as not supported by the evidence and sets forth that the evidence shows that, while the petitioner claimed to have been injured in her left shoulder, left arm and neck, she now complained of arthritic pains in her right shoulder and in many other parts of her body; that she had had her tonsils removed some years before the date of the injury and since that time has had them removed again; that she has had her appendix removed; that she had had sinus trouble and a gall-bladder condition for some years; and that her present condition was due to chronic progressive disease and not to injury It is asked that, in any event, the commission apportion the liability and find what proportion was due to injury and what part was due to nonindustrial conditions. No question was raised therein as to the matter of insurance or as to the liability of the Insurance Fund. A copy of the petition for rehearing was sent to this petitioner and to the State Hospital.

This petitioner answered the petition for rehearing, naming both the State Hospital and the Insurance Fund as defendants, and making no reference to the fact that the petition had been filed by the last-named defendant alone. This answer denied that the evidence did not support the findings and alleged that soon after the petitioner's injury on October 5, 1933, "a rheumatic and Arthritis condition began" and became steadily worse and finally resulted in her retirement as "totally and permanently disabled." The prayer was "that defendants' petition be denied, and for such other and further relief as seems equitable in the premises." A copy of this answer was served on the State Hospital, and upon the attorney who had signed the petition for rehearing. On March 12, 1937, an order was made granting the petition for rehearing. A rehearing was held on April 20, 1937, the petitioner and her attorney being present and the State Hospital and the Insurance Fund being represented by an attorney, at which time further evidence, medical and otherwise, was received. On May 17, 1937, an order was entered striking out and annulling the findings and award filed on January 19, 1937, and substituting as the decision after rehearing a new set of findings in which it was found that this petitioner is suffering from an arthritic condition which was not caused and was only temporarily aggravated by said injury, that the injury caused no loss of earnings, and that the effect of temporary aggravation of the arthritis has ceased, and an order that the petitioner take nothing. On June 17, 1937, the present proceeding was instituted.

The petitioner contends that no evidence was received at the second hearing which was contradictory of the evidence upon which the first findings and award were based, and that the evidence is not sufficient to sustain the findings and award made after the hearing. Assuming that a part of the evidence received at the first hearing sustained the award then made, there can be no question that portions of that evidence and much of the evidence received at the second hearing amply support the findings finally made. The most that can be said is that there was a conflict in the evidence and the usual rule applies.

The main point here raised is that the respondent commission was without jurisdiction to grant a rehearing. It is argued that sections 64 and 65 of the Workmen's Compensation Act (St.1917, p. 873, 874) give the right to apply for a rehearing only to an aggrieved party, that the Insurance Fund was not an aggrieved party, and that a rehearing could, therefore, not be granted. It is further argued that even if the Insurance Fund appeared in a representative capacity for the State Hospital that fact was unknown to this petitioner, that she had a right to rely upon the belief that the State Hospital was satisfied with the award against it and was not contesting the same, and that she waived nothing by appearing merely to defend an application for rehearing on the part of the Insurance Fund, to which it was not entitled.

While the petition for a rehearing was irregular in form, it was sufficient to fully advise this petitioner as to the grounds upon which it was asked, as to the issues raised, and as to which defendant was necessarily involved in those issues. It disclosed on its face that the rehearing sought was one in the interest of the State Hospital, and the only matters set forth therein affected the rights or liabilities of the Insurance Fund. If it could be held that this petitioner would have had a right to believe that the State Hospital was not contesting the award which had been made, it fully appears from her subsequent action that she did not rely and act upon this belief. She did not question the sufficiency of the petition or raise any issue affecting the Insurance Fund. She made a general appearance by answer, which was served on the State Hospital, combatting those allegations of the petition which were plainly in favor of that institution and restating her own claims against that defendant. In addition, she asked for further relief, setting forth the claim that she had suffered a total disability, whereas the first award had been based upon a 50 per cent. disability. She then appeared at the new hearing and put in evidence in her own behalf which could only be material as against the State Hospital.

The petition was accepted as sufficient and acted upon by all parties. A rehearing was granted as to the whole matter and not merely on the question of insurance. Notice was given to all, no objection was made either before the rehearing was granted or at the new hearing, and all parties appeared. The objection now raised for the first time tends to prevent a full hearing and decision on the merits of the case and is opposed to the spirit of the act which was designed to avoid technicalities, in so far as possible, and to afford all parties an opportunity to fully present their evidence to the end that justice may be done. The objection may not be sustained unless it must be held that the commission acted in excess of its powers and was without jurisdiction to grant a rehearing under such circumstances.

[1-4] While the Industrial Accident Commission cannot exercise powers outside those named in the act (Pacific Employers' Ins. Co. v. French, 212 Cal. 139, 298 P. 23), the act (St.1917, p. 831, as amended) is to be liberally construed and the commission is vested with wide powers to the end that justice may be done in all cases. Great W. P. Co. v. Industrial Acc. Comm., 196 Cal. 593, 238 P. 662. A mere error in procedure is not a ground for annulling an award. Walsh v. Industrial Acc. Comm., 1 Cal.(2d) 747, 36 P.(2d) 1072 Sections 64 and 65 of the Workmen's Compensation Act provide for rehearings under certain circumstances. The procedure provided for obtaining a rehearing includes the filing of an application by an aggrieved party, having the application verified and serving notice on other interested parties. In Mullane v. Industrial Acc. Comm., 118 Cal.App. 283, 5 P.(2d) 483, a petition for rehearing was not verified but no objection was made at the time and the party appeared. It was held that verification was waived and that the commission had jurisdiction to proceed. In Dalsheim v. Industrial Acc. Comm., 215 Cal. 107, 8 P.(2d) 840, where the service required by these sections was not made but where the party appeared, it was held that the required service was waived and that the commission had jurisdiction. Jurisdiction to support a judgment is jurisdiction over the cause and over the parties. Code Civ.Proc. § 1917. While jurisdiction over the subject-matter cannot be conferred by consent, jurisdiction over the parties may be thus obtained where they waive their privilege and voluntarily appear. In Harrington v. Superior Court, 194 Cal. 185, 228 P. 15, 16, a case involving a proceeding under section 1243 of the Code of Civil Procedure, which section

provides that such proceedings "must be commenced by filing a complaint and issuing a summons," it was contended that the court had no jurisdiction, since no summons had been issued as required by that statute, although the party had appeared. It was held that the issuance of summons was not necessary to the vesting of jurisdiction, and in considering the question the court said:

"Jurisdiction in any proceeding is conferred by law; that is, by the Constitution or by statute. Jurisdiction of the subject-matter cannot be given, enlarged, or waived by the parties. It has been held that, 'where the jurisdiction of the court as to the subject-matter has been limited by the constitution or the statute, the consent of parties cannot confer jurisdiction. But, when the limit regards certain persons, they may, if competent, waive their privilege, and this will give the court jurisdiction.' Gray v. Hawes, 8 Cal. 562, 568. See Bates v. Gage, 40 Cal. 183. However, if the court has jurisdiction of the subject-matter, the rule is otherwise, and a party may voluntarily submit himself to the jurisdiction of the court, or may, by failing to seasonably object thereto, waive his right to question jurisdiction over him. Process is waived by a general appearance, in person or by attorney, entered in the action, or by some act equivalent thereto, such as the filing of a pleading in the case or by otherwise recognizing the authority of the court to proceed in the action. 7 R.C.L. 1038 et seq.

"The issuance and service of summons in the manner provided by statute is the means whereby a court compels the appearance of a defendant before it; it is not a judicial process, and issues as a matter of course upon application to the clerk; that is, it is not regarded as an act requiring an order by the court or judge directed to the clerk. Dupuy v. Shear, 29 Cal. 238. A defendant has a right to demand that process be issued against him in the manner provided by law, but if process is not so issued and he appears generally without making objection, such appearance, being the purpose of the process, confers jurisdiction of the person and the court is empowered to act in the premises."

[5] The respondent commission had jurisdiction over the subject-matter with which we are concerned, including the power to grant rehearings. The provision as to who may file a petition for rehearing is largely a matter of procedure, although it may be said to serve a purpose somewhat similar to process in the ordinary action, by which the opposing party is brought into the proceeding. Not only was there a substantial compliance with the statute here, since the petition for rehearing disclosed its real purpose, but this petitioner appeared generally and even asked for affirmative relief. Having submitted thereto, she may not now question the jurisdiction of the commission over her, and she must be held to have waived any objection to the manner in which the proceeding had been initiated.

The order is affirmed.

We concur: MARKS, J.; JENNINGS, J.

---

23 Cal.App.2d 217

DORSA et al. v. BOARD OF SUP'RS OF SANTA CLARA COUNTY et al.

Civ. 10410.

District Court of Appeal, First District, Division 2, California.

Oct. 20, 1937.

Rehearing Denied Nov. 19, 1937.

1. Counties 🔑55

County ordinance regulating hours of retail meat markets in unincorporated territory was presumed valid as an exercise of police power.

2. Constitutional law 🔑48

The courts should not hold a legislative enactment invalid except in a clear case.

3. Constitutional law 🔑48

An attempted legislative exercise of police power may not be declared invalid unless court can say on its judicial knowledge that there is not reasonable ground for believing that regulation was enacted as a necessary protection to the public health.

4. Sunday 🔑2

County ordinance prohibiting sale of uncured or uncooked meat from an established place of business in unincorporated territory except between the hours of 7 a. m. and 6 p. m. on days other than Sunday and designated holidays was not invalid as being merely a Sunday closing enactment; any doubt on such question being resolved in favor of the ordinance.

5. Food 🔑1

County ordinance prohibiting sale of any uncured or uncooked meat from any established place of business in unincorporated territory except between designated hours on days other than Sunday and specified holidays was a valid exercise of the police power.

6. Food 🔑1

County ordinance prohibiting the sale of uncured or uncooked meat from any established place of business in unincorporated territory of county except between designated hours on days other than Sunday and specified holidays was not invalid nor discriminatory.

7. Food 🔑1

County ordinance prohibiting the sale of uncured or uncooked meat from any established place of business in unincorporated territory in county except between designated hours on days other than Sunday and specified holidays, which did not conflict with Meat Inspection Law, but was no more than a supplement to such statute, was not invalidated by the law (St.1931, p. 567).

8. Food 🔑3

County ordinance prohibiting the sale of any uncured or uncooked meat in any established place of business in unincorporated territory of county except between designated hours on days other than Sunday and specified holidays was regarded as a "health measure," because its purpose was to prevent evasion of the law during hours when public inspectors of such products were not on duty.

◆

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Proceeding by S. Dorsa and others against the Board of Supervisors of the County of Santa Clara and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Fred L. Thomas, Dist. Atty., and R. V. Bressani, both of Santa Clara, for appellants.

Elmer D. Jensen, S. F. Holstein, and Robert E. Cassin, all of San Jose, for respondents.

STURTEVANT, Justice.

From a judgment declaring void ordinance 102 of the county of Santa Clara and enjoining the defendants from enforcing the same, the latter have appealed and have brought up the judgment roll. The plaintiffs are the owners of, and are conducting retail meat markets in, the agricultural areas of the county of Santa Clara. Said markets are located in unincorporated territory. On the 25th day of February, 1935, the Board of Supervisors of Santa Clara County adopted ordinance 102. It is as follows:

"An ordinance regulating the hours of business when and the place where, uncured and uncooked meats are sold, offered for sale, received or delivered in unincorporated territory in the County of Santa Clara, and prescribing a penalty for the violation thereof.

"The Board of Supervisors of the County of Santa Clara, do ordain as follows:

"Section One: It shall be unlawful for any person, firm, partnership, association or corporation to sell or offer for sale any uncured or uncooked meats from any established place of business in unincorporated territory in the County of Santa Clara for the purpose of sale or delivery to dealers or consumers, or for the purpose of any delivery, or to open for business any place of business in unincorporated territory in the County of Santa Clara where any uncured or uncooked meats are sold or offered for sale, or permit such place of business to be kept for business, or to receive at such place of business any uncured or uncooked meats except between the hours of seven (7) o'clock a. m. and six (6) o'clock p. m. on days other than Sunday, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Admission Day, Armistice Day, Thanksgiving Day, and Christmas Day; Provided, however, that in cases of a holiday falling on a Saturday, Sunday or Monday, the places of business hereinabove defined may be kept open between the hours of seven (7) o'clock a. m. and twelve (12) o'clock noon.

"Section Two: Any person, firm, or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00 or by imprisonment in the County Jail for a period of not more than six months, or by both such fine and imprisonment.

"Section Three: If any section, sub-section, sentence, clause, or phrase, of this ordinance is for any reason held to be invalid, such decision or decisions shall not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares it would have passed this ordinance and each section, subsection, sentence, clause and phrase hereof irrespective of the fact that any one or more sections, sub-sections, sentences, clause or phrases be declared invalid.

"Section Four: This ordinance shall take effect thirty (30) days from and after its passage."

[1-3] The defendants contend the ordinance is a valid exercise of the police power vested in the defendant board. It is presumed that the ordinance is valid, and it is settled law that the courts should not, except in a clear case, hold a legislative enactment invalid. In Skaggs v. City of Oakland, 6 Cal.(2d) 222, at page 225, 57 P.(2d) 478, 480, the court said: "We agree, of course, that before this court appropriately may pronounce invalid an attempted legislative exercise of police power, we must be able to say on our judicial knowledge that the legislative body could not have had any reasonable ground for believing that the regulation as enacted is a necessary measure of protection to the public health. See Dominion Hotel v. Arizona, 249 U.S. 265, 39 S.Ct. 273, 63 L.Ed. 597, as quoted in West Coast Theatres v. City of Pomona, 68 Cal. App. 763, 230 P. 225." Therefore, we will pass to a consideration of the plaintiffs' attacks on the validity of the ordinance.

[4] Contending that the ordinance is solely an enactment requiring the closing of certain butcher shops on Sunday, the plaintiffs assert that it is invalid, and they cite and rely on cases involving statutes regulating the barber business, such as Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664. But looking at the entire ordinance, we are unable to say it was intended to be merely a Sunday closing enactment. Any doubt on that question must be resolved in favor of the ordinance.

[5, 6] It is next claimed that the enactment of the ordinance was not a valid exercise of the police power. The plaintiffs cite authorities from other jurisdictions. No one of them is in point. During the argument they cited Deese v. City of Lodi (Cal.App.) 69 P.(2d) 1005. It is not in point. That case involved an ordinance which on its face showed many invalid discriminations. The ordinance before us does not do so. On the other hand, In re Lowenthal, 92 Cal.App. 200, 267 P. 886, and In re Gatsios, 95 Cal.App. 762, 273 P. 826, are very closely in point. The ordinances there discussed were closely similar to the one now being attacked, and each was held to be a valid exercise of the police power. Those cases were discussed and approved by the court in Ganley v. Claeys, 2 Cal.(2d) 266, 40 P.(2d) 817. In that case the court clearly showed that the barber shop rule (the one for which these plaintiffs contend) stands on a different basis than such ordinances as the one before us. On page 269 of 2 Cal. (2d), page 818 of 40 P.(2d) the court said: "Appellants stress two cases (In re Lowenthal, 92 Cal.App. 200, 267 P. 886, and In re Gatsios, 95 Cal.App. 762, 273 P. 826), involving and upholding ordinances requiring the closing of butcher shops between certain hours, and argue that they are controlling here. We cannot agree with this contention for two reasons. In the first place, the statute while committing to the director of agriculture the general supervision of slaughter houses and establishments used in preparing animals for food purposes, expressly conferred upon cities the right to provide for local supervision and local inspections. In the second place, regulation in the butchering business, as undertaken by the state, deals directly with the product which is subject to rigid inspection in order to secure a wholesome supply of meat; whereas in the barbering business the regulation is accomplished by limiting the practitioners to those who understand and will comply with sanitary methods adopted and approved by the state."

[7] The plaintiffs call attention to the fact that a Meat Inspection Law has been enacted. Stats.1931, c. 275, p. 567. It is not claimed the ordinance is such an enactment, nor that the statute and ordinance conflict, nor that the ordinance is other than a supplement to the statute. Under those circumstances, the enactment of 1931 in no manner invalidates the ordinances before us. It should be noted the statute referred to by plaintiffs was repealed and that the substance thereof was re-enacted in 1933 (St. 1933, c. 25, p. 60). But the repeal and re-enactment thereof are immaterial so far as this discussion is concerned.

[8] In the next place, they ask how can it be said that ordinance 102 is a health measure by merely limiting the hours when butcher shops can be open for business? The same question in effect was propounded in the case entitled In re Gatsios, supra. At page 765 of 95 Cal.App., page 828 of 273 P., the court said: "The purpose of such

ordinances as the one in question is the protection of public health, and the provision thereof regulating the hours of business of shops and markets where the products sold are subject to inspection by public authority, is to prevent evasion of the law during the hours when such inspectors are not on duty." No further reply is necessary.

It is clear that no one of the attacks on said ordinance is well founded. Therefore, the judgment should be reversed.

It is so ordered.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

---

23 Cal.App.2d 155

PEOPLE v. HENRY.

Cr. 503.

District Court of Appeal, Fourth District, California.

Oct. 14, 1937.

1. Automobiles 🔑355(13)

A motorist's declaration that he has no recollection of anything that may have occurred for an interval during which circumstantial evidence overwhelmingly indicates that his automobile was involved in an accident whereby another person was injured or killed is not determinative of the matter (St. 1935, p. 170, § 480).

2. Automobiles 🔑355(8, 13)

In prosecution for negligent homicide and for failure to stop and render aid after automobile accident, evidence was sufficient for jury to find that defendant knew he had struck a human being, notwithstanding defendant's testimony that he had no recollection of what had happened, since jury was not bound to accept that statement as true in face of other evidence (St.1935, p. 170, § 480).

3. Criminal law 🔑1169(6)

In prosecution for negligent homicide and for failure to stop and render aid after automobile accident, acquittal on charge of negligent homicide with respect to which intoxication was alleged did not cure error, if any, in reception of journal article and diagram on question of intoxication in alleged violation of hearsay rule where defense to other charge was that defendant had no recollection of what had happened, and prosecution sought to overcome defense by showing that defendant's amnesia, if any, was caused by his voluntary indulgence in intoxicating liquor, since element of intoxication entered into trial on that charge also (St. 1935, p. 170, § 480).

4. Criminal law 🔑1186(4)

In prosecution for negligent homicide and for failure to stop and render aid after automobile accident, reception of journal article and diagram on question of intoxication as shown by alcoholic content of blood did not require reversal of conviction for failure to stop and render aid, even if reception was erroneous as violative of hearsay rule, in view of other evidence authorizing conviction without that evidence (St.1935, p. 170, § 480; Const. art. 6, § 4½).

5. Criminal law 🔑1172(6)

In prosecution for negligent homicide and for failure to stop and render aid after automobile accident, instruction on flight in precise language of statute sanctioning giving of such instruction was not prejudicial on ground that flight was an essential element of failing to stop and render aid, since flight is not an essential element of negligent homicide, and as to that offense the fact of flight was a matter which jury was entitled to consider under instruction as given (St.1935, p. 170, § 480; Pen.Code § 1127c).

6. Criminal law 🔑823(4)

In prosecution for negligent homicide and for failure to stop and render aid after automobile accident, instruction on flight was not prejudicial, even if its effect was restricted to offense of failing to stop and render aid, where various elements of that offense were carefully explained to jury in other instructions, and it was repeatedly called to jury's attention that knowledge by defendant that a person had been injured in accident was a necessary element which prosecution had to prove beyond a reasonable doubt (St.1935, p. 170, § 480; Pen.Code § 1127c).

7. Criminal law 🔑823(9)

In prosecution for negligent homicide and for failure to stop and render aid after automobile accident, instruction that a joint operation of act and intent, or criminal negligence, must exist in every crime, but that, when an act is of itself unlawful, the law presumes the criminal intent, and defendant has burden to show absence of it, was not prejudicial as dispensing with proof of knowledge that a human being had been injured or killed and as advising jury that presumption of knowledge arose from very commission of act, where jury was repeatedly advised that knowledge was an essential element of offense and had to be proved by prosecution beyond a reasonable doubt (St. 1935, p. 170, § 480).

"Knowledge" and "intent" convey entirely different concepts. "Knowledge" means acquaintance with fact; the act or state of understanding; whereas "intent" means intending or purposing.

8. Automobiles ⚷336

A specific intent is not a necessary element of offense of failing to stop and render aid after an automobile accident (St.1935, p. 170, § 480).

9. Criminal law ⚷1144(15)

In prosecution for negligent homicide and for failure to stop and render aid after automobile accident, consideration by jury of written instructions including two relating to plea of former jeopardy and verdict to be rendered on plea was not prejudicial where those instructions were blocked out, no evidence was produced with reference to plea, no mention was made of it in oral instructions, and neither verdict submitted nor returned contained any reference to plea, since it could be assumed that jury could not have heeded instructions so obviously deleted.

10. Criminal law ⚷161

A person may not be twice prosecuted for the same offense.

11. Criminal law ⚷1172(7)

In prosecution for negligent homicide and for failure to stop and render aid after automobile accident, consideration by jury of written instructions including two relating to plea of former jeopardy which had been blocked out was not prejudicial, even if jury considered eliminated instructions, since reasonable inference from reference to such plea would have been that defendant had once been placed in danger of punishment for identical offenses, and hence effect of reference to plea must have been favorable to defendant.

12. Criminal law ⚷1001

Trial court has very wide discretion in passing upon application for probation (Pen. Code § 1203, as amended by St.1935, p. 1706).

13. Criminal law ⚷1001

Where defendant's counsel stated, after motion for new trial was denied, that he wished to make application for probation, trial court summarily denied application stating reasons for denial, and counsel stated prior to pronouncement of judgment that he wished to renew application, trial court did not act arbitrarily in denying application with proviso that denial was without prejudice to renewal thereof upon determination of appeal from judgment, since there was no request for permission to file a formal application for probation, and hence no denial of such request (Pen.Code § 1203, as amended by St.1935, p. 1706).

◆

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Edward M. Henry was convicted of failing to stop and render aid to a person who was injured in an accident wherein an automobile driven by him was involved, and he appeals from the judgment and from an order denying his motion for a new trial.

Judgment and order affirmed.

Borton, Petrini & Conron, of Bakersfield, and Renwick Thompson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Thomas Scott, Dist. Atty., and Norman Main, Deputy Dist. Atty., both of Bakersfield, for the People.

JENNINGS, Justice.

The defendant herein was accused by an information containing two counts of having committed two criminal offenses. The first count charged the commission of the crime of negligent homicide and the second alleged that he was the driver of an automobile which was involved in an accident resulting in injury to a designated person and that he did not immediately thereafter stop such vehicle at the scene of the accident and give the information required by law and render reasonable assistance to such injured person. Upon arraignment the defendant entered a plea of not guilty to each of said offenses and was thereafter tried before a jury which returned a verdict of acquittal as to the charge of negligent homicide and a verdict of conviction as to the accusation that the defendant had failed to stop and render aid to a person who was injured in an accident wherein the automobile which the defendant was driving was involved. Defendant's motion for a new trial was denied and judgment whereby it was ordered that he be confined in the state prison was thereupon pronounced against him. From this judgment and from the order denying him a new trial the defendant appeals.

The accident which caused the filing of the information occurred at a point about 15 miles south of the city of Bakersfield on state highway No. 99 at approximately 5:30 in the afternoon of January 3, 1937. The evidence showed that the defendant, who was driving a Plymouth coupé, left the city of Visalia about 2:30 p. m. on the above-mentioned day and that he proceeded south en route to his home in the city of Los Angeles. He arrived in Bakersfield about 4 p. m. He paused in the last-mentioned city for approximately an hour, during which time he consumed a sandwich and several drinks which contained intoxicating liquor. About 5 p. m. of said day he resumed his journey. At the point where the accident took place two trucks were parked on the west side of the highway whereon defendant was driving. The highway at this point consists of a paved section 20 feet in width and a shoulder or apron of cut-back asphalt concrete 6 feet wide on each side of the paved portion of the roadway. The above-mentioned trucks were parked parallel to the highway, end to end. One of them was a large refrigerator truck which was headed north. The other truck was likewise a large truck but was flat and had stakes on the side and endboards. The latter truck was headed south. The distance from the center line of the highway to the east wheels of both trucks was about 14 feet. At the time the accident occurred the traffic moving along the highway in both directions was heavy. It was then dusk and the lights on motor vehicles which were on the highway were illuminated. This was true of the lights on the refrigerator truck and of the lights on defendant's automobile. The headlights of the flat truck were not lighted but its clearance lights were illuminated. The evidence showed that the truck which was headed south had broken down and that the refrigerator truck had been dispatched to the scene of the breakdown so that the merchandise which was being transported on the flat truck might be transferred to the refrigerator truck. The refrigerator truck was being backed to the rear of the flat truck for the purpose of facilitating the transfer when the accident occurred. At this time, Owen E. Foley, who was the driver of the flat truck, was engaged in procuring flares from the flare box which was on the left-hand side of his truck, behind the driver's cab. These flares were to be lighted and placed along the highway to give warning of the parked trucks to motorists. There was no eyewitness to the events which thereafter occurred. Circumstantial evidence which was produced indicated that the right front of the automobile which the defendant was driving on the west side of the highway collided first with the refrigerator truck, sideswiping it, and next with the left side of the flat truck, and that defendant's automobile struck Foley and carried him for a distance of about 75 to 100 feet before dropping him at the side of the highway. As a result of the injuries which Foley received in the collision he died soon after his body was discovered. The defendant continued on his way south after the collision without stopping his automobile, so far as appears. About 35 miles south of the scene of the collision he was halted by a member of the California highway patrol and was apprehended. At this time, which was 6:42 p. m., it was observed that the defendant's automobile had been damaged. The glass in the right front headlight was broken, the light was not burning, and the headlight was bent back in the direction of the cowl. The license plate which was carried at the right front side was likewise bent. The right front hood of the car was dented as was also the right front fender. There were also other dents and scratches on the right side of the automobile. When the defendant was stopped he was asked to step out of his car. He complied with the request and the arresting officer then perceived that he was to some extent unsteady on his feet and that his breath had an odor of alcohol. It was also noted the he had evidently vomited, as indicated by certain marks which then appeared on his clothing and shoes. The defendant was asked if he had drunk any intoxicating liquor. He first denied that he had, but later admitted that he had some drinks at Bakersfield. The damaged parts of his automobile were exhibited to him and he was asked as to how the damage was caused. He answered that a truck had backed into his car near Bakersfield. Inquiry as to whether he had secured the name of the truck driver or the license number of the truck brought the response that he had not because he was in a hurry to get home and therefore proceeded on his way without attempting to secure the suggested information.

It was not contended during the trial nor is it contended on this appeal that the above-narrated evidence, much of which was circumstantial, was insufficient to show that the defendant's automobile was involved in an accident and that it struck Foley, thereby causing the injuries which resulted in the man's death. The defendant testified in his own behalf and stated that he remembered driving along the highway after he left Bakersfield to a point which he identified as the place where a road to the town of Arvin takes off from the highway and that from this point, which is approximately 3 miles north from the scene of the accident, he remembered nothing until he was stopped by the traffic officers near Gorman.

[1, 2] The last-mentioned testimony forms the basis for the first contention advanced on this appeal. It is pointed out that the offense of failing to stop and render assistance is not made out unless it is shown that the person accused of the offense actually knew that the automobile which he was driving had struck someone. It is next observed that the defendant's testimony that he had no recollection of anything that occurred between the Arvin road intersection and Gorman was not contradicted. The third step in this argument is that, since the defendant's testimony is uncontradicted, the necessary element of knowledge was not proven, hence the jury's verdict of guilt is not supported by the evidence and the judgment which was rendered in conformity with the verdict must be reversed.

With respect to the contention thus ingeniously presented it may be remarked that the defendant's testimony was not directly rebutted nor contradicted for the obvious reason that it could not be. The defendant was alone and is the only person who could state whether or not he actually knew that the automobile which he was driving had been involved in an accident. However, it cannot be the law that, because the driver of an automobile declares that he has no recollection of anything that may have taken place for an interval of time during which the circumstantial evidence overwhelmingly indicates that his automobile was involved in an accident whereby another person was injured or killed, the matter must be considered determined by such testimony. If such were the rule section 480 of the California Vehicle Code (St.1935, p. 170) is nullified for all practical purposes. The jury was not, however bound to accept as true the defendant's statement in the face of the extensive damage which the evidence showed his automobile had sustained and in the face of the proven fact that the body of Foley was picked up and carried for a distance of 75 to 100 feet before it was dropped by the automobile which struck him and which the evidence showed was the automobile which the defendant was driving. That the defendant did not know that he had struck a human being is inconceivable in view of the above facts which were developed by the evidence. People v. Hurley, 13 Cal.App.(2d) 208, 212, 56 P.(2d) 978. Furthermore, another significant bit of evidence which conveyed definite refutation of the defendant's story deserves mention. As above stated, when the defendant was apprehended near Gorman and the damaged condition of his car was called to his attention and he was asked how it had occurred he replied that a truck had backed into his automobile near Bakersfield. His answer at that time indicated that he did have knowledge that his car had been involved in an accident and that his capacity of recollection was then functioning. From this fact alone the jury may well have concluded that the defense of temporary amnesia extending back beyond the time when the collision occurred was conveniently fabricated for the express purpose of avoiding the penalty which the law might impose by way of punishment for his dereliction. Under all the facts and circumstances disclosed by the record we are not prepared to announce that such a conclusion was improper.

[3, 4] The second contention advanced by the defendant as a reason for the reversal of the judgment has to do with the admission of certain evidence by the trial court. During the presentation of defendant's case a physician was called as an

expert witness in his behalf. One of the chief reasons for summoning this witness was to overcome the effect of certain evidence produced by the prosecution as a part of its case. The plaintiff's evidence established that after the defendant was arrested and at about 9:30 p. m. of January 3, 1937, a sobriety test was administered to him at the Kern General Hospital in the city of Bakersfield by a practicing physician in the last-mentioned city. It was shown that one of the features of the test consisted of the taking from defendant of a sample of his blood which was subjected to chemical analysis for the purpose of determining the quantity of alcohol contained therein. The analysis thus made showed that the defendant's blood then contained .18 of 1 per cent. of alcohol and the state's medical witness testified that the result obtained from the blood analysis showed that the defendant was affected by alcoholic stimulation. In rebuttal of this evidence the defendant's medical witness testified on direct examination that it was the consensus of opinions of medical experts that there is no intoxication when an analysis of the blood content of an individual shows the presence therein of less than .2 of 1 per cent. of alcohol. On cross-examination this witness stated that by way of preparation for the testimony which he expected to give in the case he had consulted certain named medical texts. He was asked whether or not he was familiar with a certain article which appeared in the January, 1937, issue of the Medico-Legal Review of London in which article certain recent work done by the British Medical Association was discussed. The article to which his attention was thus called was then exhibited to the witness, who replied that he had not read it. Over the objection of defendant's counsel that the article constituted hearsay evidence the prosecutor was permitted to read it to the jury and the witness was thereupon subjected to cross-examination with respect to the contents of the article. The same witness was cross-examined with respect to testimony which he had given on direct examination regarding the rate of decrease in alcoholic content in the blood of heavy drinkers, moderate users of intoxicating liquor, and total abstainers. His attention was then directed to a certain article with an accompanying diagram which appeared in the March, 1935, issue of a journal entitled "Archives of Neurology and Psychiatry" and he was asked whether or not he had read the article prior to giving his testimony. Upon receiving a negative reply to the inquiry and over the objection of defendant's counsel that the diagram appearing in connection with the article was hearsay and incompetent the prosecutor was allowed to exhibit the diagram to the jury and it was admitted in evidence.

The basis for the complaint which is here urged to the rulings of the trial court admitting the above-described evidence is, as was contended during the trial, that both the first-mentioned article and the diagram were pure hearsay and that their reception in evidence constituted a flagrant violation of the familiar rule excluding hearsay evidence. It will here be assumed without deciding the question that the defendant's contention is correct and that the court erred in admitting the evidence. Indulgence in this assumption does not, however, necessarily lead to the conclusion that the judgment must be reversed. Section 4½ of article 6 of the California Constitution declares that no judgment shall be set aside for improper admission of evidence unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Examination of the entire record has failed to produce a conviction that the error which it is assumed the trial court committed in admitting the evidence resulted in a miscarriage of justice. It may be proper to observe that the argument of the plaintiff that the claimed error was cured by the jury's verdict of acquittal of the charge of negligent homicide has not contributed materially to arriving at the conclusion that the criticized action of the trial court is not a sufficient reason for reversing the judgment. While it is true that the element of intoxication of the defendant was alleged only with respect to the charge of negligent homicide, study of the record demonstrates that this element also entered into the defendant's trial on the charge of failing to stop and render assistance. The defense to the latter accusation was, as heretofore noted, lack of knowledge by the defendant that his automobile was involved in a collision by reason of an entire failure of memory which in the opinion of defendant's medical expert could have been caused by nervous shock. The prosecution sought to overcome the defense thus advanced, first, by evidence of circumstances surrounding the accident which indicated that the defendant must have known that his car was involved in an accident in which a person was injured and, second, that the defendant's claimed amnesia, if it had any existence in fact, was caused by his voluntary indulgence in intoxicating liquor to such an extent that he was intoxicated when the accident occurred. It is apparent that the element of intoxication was a factor which entered into the defendant's trial on both charges and we cannot therefore agree with the plaintiff's contention that, assuming error on the part of the trial court in its reception of the evidence under consideration, such error was necessarily cured by the verdict of acquittal on the charge of negligent homicide. We are nevertheless impelled to the conclusion, from a review of the entire record, that the error which it is assumed the trial court committed in admitting the evidence did not result in a miscarriage of justice.

In reaching this conclusion it will be assumed that the jury may have accepted the criticized evidence and from it, together with the fact that the blood test taken at 9:30 p. m. showed an alcoholic concentration of .18 of 1 per cent. may have determined that the defendant was in fact intoxicated when the collision took place at 5:30 p. m. However, in order that this assumption may become important in our analysis of the evidence it must further be assumed that the jury gave full credence to the defendant's testimony that he had no recollection of anything that happened in an interval of time which began some moments before he arrived at the point of collision and ended abruptly when he was stopped near Gorman more than an hour after the collision occurred. As heretofore suggested the defendant's story when it is projected against the background of the circumstances which surrounded the unfortunate affair is so fantastic that it must be characterized as incredible. Particularly significant in this regard is the evidence which showed that after he was stopped and the very apparent damage suffered by his car was exhibited to him and he was asked how this damage had occurred, he did not then declare that he did not know or could not recollect. On the contrary, he betrayed a very definite capacity of recollection by replying that a truck had backed into him near Bakersfield and an inquiry as to whether or not he had secured the license number of the truck or the name of the truck driver elicited the response that he had made no effort to secure the suggested information because he was in a hurry to get home. In the face of this testimony, uncontradicted except by the defendant's testimony that he did not remember telling the arresting officers that a truck had backed into his car, it is inconceivable to a reader of the cold record that the jury could have believed the defendant's story that he had no recollection of anything that happened as he proceeded along the highway from the point where the Arvin road took off to Gorman. Obviously, if the jury did not accept the defendant's story of temporary total amnesia, the question of whether or not the defendant was intoxicated becomes relatively unimportant. Since we entertain a settled conviction that the members of the jury could not, in the face of all the damning circumstances that appeared in evidence, have believed the story, it follows that we are convinced that the error in admitting the criticized evidence, assuming as we have done that error was thereby committed, could not have contributed in the slightest degree to the verdict that was returned. In our opinion, if the evidence, assumed to have been erroneously admitted, had been rejected, the defendant must nevertheless have been convicted.

[5, 6] The defendant complains that the trial court gave an instruction on flight which it is contended was peculiarly prejudicial to him because of the fact that flight is an essential element of the offense of which he was convicted. Hence it is argued that the criticized instruction in effect advised the jury that if the necessary element of flight was established such showing would be evidence tending to establish another essential element of the offense, to wit, knowledge.

With reference to the complaint thus registered it may first be observed that the instruction which the court gave is in the precise language specified by section 1127c of the Penal Code and that this statute expressly provides that "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially" in the language which the trial court here employed. Second, it may properly be observed that the defendant was being tried for the commission of two distinct offenses and that it may not be urged that flight is an essential element of the crime of negligent homicide. As to the last-mentioned offense the fact of flight was therefore a matter which the jury was entitled to take into consideration under an instruction which followed the precise language of a statute expressly sanctioning the giving of such an instruction. People v. Blake, 129 Cal. App. 196, 204, 18 P.(2d) 399; People v. Luce, 135 Cal.App. 1, 3, 26 P.(2d) 501; People v. Wier (Cal.App.) 66 P.(2d) 703. Third, it must be remarked that in several of the many instructions which the court gave the various elements of the offense of failing to stop and render aid were carefully explained to the jury and in particular it was repeatedly called to the jury's attention that knowledge by the defendant that a person had been injured in an accident wherein his automobile was involved was a necessary element of the offense which the prosecution was required to prove beyond a reasonable doubt. We think, therefore, that the instruction regarding flight, even if its effect is restricted to the last-mentioned offense, was not prejudicial to the defendant when the entire body of the court's instructions is taken into consideration.

[7, 8] Defendant also complains of another instruction which the trial court gave, whose language is as follows: "In every crime or public offense, there must exist a union or joint operation of act and intent, or criminal negligence; but when the act committed by the accused is of itself an unlawful act, the law, in the first instance, presumes the criminal intent, and the onus or burden of proof, falls upon the defendant to show the absence of criminal intent."

As an abstract statement of the law the instruction is not in all respects correct. An almost identical instruction was held to be improper in People v. Maciel, 71 Cal. App. 213, 217, 234 P. 877, on the ground that it violated the fundamental rule that whenever a specific intent is an essential ingredient of an offense no presumption of law can arise to obviate the requirement that the prosecution shall prove such intent just as it is bound to prove any other fact which is a necessary element of the crime. To the same effect is the decision in People v. Flores, 86 Cal.App. 235, 237, 260 P. 822.

Defendant's contention that the instruction was prejudicial to him as to the offense of which he was convicted because its effect was to dispense with proof by the prosecution of the essential element of knowledge that a human being had been injured or killed and more particularly because it advised the jury that a presumption of knowledge arose from the very commission of the act, is, however, not impressive. The instruction makes no reference to knowledge and it may not be declared that knowledge and intent are synonymous terms. The two words convey entirely different concepts. Knowledge means acquaintance with fact; the act or state of understanding. Intent is defined as intending or purposing. A specific intent is not a necessary element of the crime of which the defendant was convicted. As heretofore indicated, the jury was repeatedly advised by other instructions that knowledge is an essential element of the offense charged in the second count which the prosecution was required to prove beyond a reasonable doubt. We think, therefore, that when the instructions are considered in their entirety it may not be declared that the jury could have been misled by the instruction or that the giving of it constituted error which demands reversal of the judgment. People v. Stephens, 29 Cal.App. 616, 622, 157 P. 570, 572; People v. Jensen, 82 Cal.App. 489, 255 P. 781.

[9-11] The defendant further complains because the written instructions which the court gave, including certain instructions which were refused, were taken to the jury room and were considered by the jury in its deliberations. Apparently during the absence of court and counsel the jury expressed a desire to have the court's written instructions and the bailiff took them to the jury room. Included among the instructions thus taken were two which related to a plea of former jeopardy which the defendant had originally entered but later withdrew and as to which no evidence was presented. These two instructions were blocked out and marked through with diagonal pencil lines. Defendant's complaint with respect to the deleted instructions is without merit. In the first place, it is obvious to the most casual observer that the two instructions had been eliminated. In the second place, not an iota of evidence was produced during the trial with reference to the plea of former jeopardy and no mention was made of it by the court when the jury was orally instructed. It may be assumed that

the jury was composed of persons of ordinary intelligence and it is inconceivable that a jury thus composed could have given any heed to the instructions so obviously deleted. In the third place, it is made clear by the verdict that the jury did not consider the eliminated instructions. The two instructions advised the jury that the defendant had entered a plea of former jeopardy as to each charge contained in the information and that if the jury should find that the plea was correct it should render a verdict accordingly, but that if the jury should find that the defendant had not theretofore been placed in jeopardy a verdict denying the plea should be returned. The forms of verdict submitted to the jury contained no mention of the plea of former jeopardy and neither verdict which was returned contained any reference thereto. Finally, if it be conceded that the jury could conceivably have considered the eliminated instructions and did consider them, no prejudice is shown to have resulted to the defendant thereby. The reasonable inference derivable from a reference to a plea of former jeopardy would have been that the defendant had once been placed in danger of punishment for the identical offenses for which he was being prosecuted, and it is a familiar principle comprehensible to the laity that a person may not be twice prosecuted for the same offense. The effect of a reference to a plea of former jeopardy, assuming that it was considered at all, must therefore have been favorable to the defendant.

[12, 13] The defendant's final complaint on this appeal is that the trial court arbitrarily refused to entertain an application for probation. The record does not sustain the objection. Examination of the transcript discloses that, after the motion for a new trial was denied, defendant's counsel stated that he wished to make application for probation and that, after some discussion as to whether or not it was then the proper time for such an application to be made had ensued, the court summarily denied the application for the reason that he thought the case was not one wherein probation should be granted. The record further shows that at a later time and prior to pronouncement of judgment defendant's counsel stated that he wished to renew the application for probation with the understanding that if it should be denied such action would be without prejudice to a renewal of the application in the event the judgment should be affirmed on appeal. The trial court thereupon again denied the application with the express proviso that such denial was without prejudice to a renewal of the application upon determination of an appeal from the judgment.

From the foregoing it is apparent, first, that there was no request by defendant's counsel for permission to file a formal application for probation and hence no denial of such a request and, second, that the statement of defendant's counsel to the effect "that he would like to make application for probation for the defendant" was considered by the court to be an application for probation which the court summarily denied, giving his reasons for the denial at some length. There was then no arbitrary refusal of permission to present an application for probation, but on the contrary a denial of an oral application by the judge who had presided during the trial of the action and was familiar with all the facts, including the defendant's character and his reputation for the various traits involved in the offense of which he was convicted, which was very fully developed by the testimony of a large number of witnesses. Section 1203 of the Penal Code (as amended by St.1935, p. 1706) expressly authorizes the summary disposition of an application for probation and it is impossible to find anything in the record which indicates that the trial court abused the very wide discretion which it possessed in passing upon the application. People v. Lippner, 219 Cal. 395, 400, 26 P.(2d) 457; People v. Martin, 114 Cal.App. 337, 347, 300 P. 108; People v. Judson, 128 Cal.App. 768, 774, 18 P.(2d) 379; People v. Howe, 1 Cal.App.(2d) 518, 520, 36 P.(2d) 820.

The judgment and order from which this appeal has been taken are and each of them is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

BANK OF CALIFORNIA et al. v. McCOY, Sheriff, et al.

Civ. 5719.

District Court of Appeal, Third District, California.

Oct. 18, 1937.

Hearing Denied by Supreme Court Dec. 16, 1937.

1. Chattel mortgages ⚿1

The primary purpose of a chattel mortgage is to transfer title of personalty to another as security for payment of money or performance of contract or other obligation (Civ.Code, § 2920).

2. Contracts ⚿1

One may enter into any contractual relations with a party so long as such relationship does not interfere with rights of innocent third persons.

3. Chattel mortgages ⚿18

As between parties thereto, provision of chattel mortgage that it should cover other live stock now or hereafter belonging to mortgagor and now or hereafter situated on certain realty was valid (Civ.Code, §§ 2883, 2930).

4. Chattel mortgages ⚿1

A chattel mortgage which conforms to requirements of statute providing when such mortgages are void as to third persons is not void (Civ.Code, § 2957).

5. Chattel mortgages ⚿1

Where chattel mortgage is valid between parties thereto and there is no provision making it void as to third persons, its terms are binding upon those who take with notice (Civ.Code, § 2957).

6. Chattel mortgages ⚿138(1)

A properly recorded chattel mortgage is binding upon subsequent lienholder or judgment creditor to same extent that it would be binding upon original mortgagor, and any property included therein may not be levied upon by attachment or execution (Civ.Code, § 2957).

7. Chattel mortgages ⚿49(1)

A provision of chattel mortgage that it covered other live stock now or hereafter belonging to mortgagor and now or hereafter situated on certain realty was sufficient, as against a subsequent judgment creditor, to cover after-acquired live stock which had no actual or potential existence at time of execution of mortgage (Civ.Code, §§ 2883, 2930, 2957).

8. Courts ⚿97(1)

The Court of Appeal is not bound by decisions of federal courts on nonfederal questions.

9. Chattel mortgages ⚿18

Under statutes, chattel mortgage can provide for the lien applying to subsequently-acquired personalty, and the lien attaches immediately upon acquisition of such personalty by mortgagor (Civil Code, §§ 2877, 2883, 2884, 2930).

10. Chattel mortgages ⚿250

An agreement extending lien of chattel mortgage is valid and binding as to all parties.

11. Chattel mortgages ⚿199

The failure of chattel mortgagees to call agreements extending time of payment of notes secured by mortgage to attention of sheriff levying upon property subject to mortgage did not waive any of mortgagees' rights, where extension agreement was fully executed between mortgagor and mortgagee prior to acquisition of any rights of execution creditor, so that execution creditor and sureties on his bond executed to protect sheriff in making levy were liable for value of sheep and for fees of mortgagees' attorneys.

12. Chattel mortgages ⚿170(2)

An officer levying or selling mortgaged personalty is guilty of conversion (Civil Code, § 2969).

13. Chattel mortgages ⚿136

The taking of additional security does not waive lien of prior mortgage.

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Action by the Bank of California and another, trustees under the will of Sidney V. Smith, deceased, against Charles J. McCoy, Sheriff of Yuba County, and others. Judgment for defendants, and plaintiffs appeal.

Reversed, with directions.

For prior opinion, see 69 P.(2d) 1013.

Rich, Weis & Carlin, of Marysville, for appellants.

Ray Manwell and Ivan C. Sperbeck, both of Marysville, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

A rehearing was granted in this cause by reason of the fact that all of the occurrences involved in this action took place prior to the act of the Legislature (Stats. 1935, p. 2225), amending section 2957 of the Civil Code relative to the rerecording of chattel mortgages, was overlooked, and, therefore, the section as amended should not have been considered or followed in the decision of this cause.

On the original hearing the opinion prepared for this court by Judge Maxey (sitting as a justice pro tempore), is so complete as to the facts involved and some of the questions considered, that we here readopt the main portion thereof, as follows, to wit:

"On October 31, 1928, Sidney V. Smith, Jr., made, executed and delivered a promissory note, payable on demand, to the plaintiffs herein. On June 1, 1930, Sidney V. Smith, Jr., made, executed and delivered a second and separate promissory note, payable one day after date, to the plaintiffs herein. On this latter date, namely, June 1, 1930, to secure the payment of the two notes, the said Sidney V. Smith, Jr., made and executed a chattel mortgage which was duly recorded in Yuba county, California. The property described in said chattel mortgage was as follows: '1 Willys Knight automobile truck, bearing the motor number 38188 and serial number 36027; 1 Star Roadster automobile, bearing the motor number 14L22181; 50 head of horses, together with the increase of said horses, and all ranch and farming implements, household furniture, kitchen utensils and equipment and other livestock and other personal property now or hereafter belonging to the mortgagor, and now or thereafter situated on the real property in the County of Yuba, State of California, more particularly described as follows, to-wit: The south half of the south half of Section 14, and the north half of Section 23, Lot 1 of the Southeast quarter, and the northeast quarter of the southeast quarter of Section 23, all in Township 16 North, Range 5 East, Mount Diablo Base and Meridian, Yuba County, California.'

"That on the 17th day of September, 1932, the plaintiffs herein and said Sidney V. Smith, Jr., entered into an agreement in writing, extending the time of payment of the note dated October 31, 1928, and on the 27th day of April, 1934, the plaintiffs herein and the said Sidney V. Smith, Jr., entered into an agreement extending the time of payment of the note dated June 1, 1930. Neither of these agreements was ever acknowledged before an officer authorized to administer oaths, and neither of these agreements was ever recorded.

"Subsequent to the execution of the chattel mortgage the said Sidney V. Smith, Jr., in an independent transaction and without using any of the funds mentioned in the chattel mortgage, purchased approximately 200 head of sheep, which were thereafter taken by him onto the lands and premises mentioned in the chattel mortgage. These sheep were not paid for in full until the year 1933.

"On the 6th day of May, 1935, the defendant, Charles J. McCoy, as sheriff of the county of Yuba, at the instance and request of defendant, Byron Burris, a judgment creditor of said Sidney V. Smith, Jr., levied a writ of execution against the sheep and took them into his possession. The plaintiffs thereafter demanded the release of said sheep from the sheriff, which demand was refused. Thereafter, the defendants, Byron Burris, Annie Burris and Evelyn Wright, delivered to defendant Charles J. McCoy, as sheriff, an undertaking guaranteeing to save the sheriff harmless from any claim of the plaintiffs herein by reason of the levy of the execution above mentioned. This undertaking was given pursuant to the provisions of section 2969 of the Civil Code. Thereafter, and on the 29th day of May, 1935, the sheriff sold the sheep at execution sale to the defendant, Byron Burris, and delivered the possession of said sheep to the said Burris.

"This action was brought by the plaintiffs herein upon the bond given by the defendants to the sheriff, seeking to recover from said defendants the value of the sheep so sold under execution. At the time of the levy of the execution, the recorded mortgage indicated that the notes had been barred by the statute of limitations. No notice was given the judgment creditor of the extension agreement between the plaintiffs and Sidney V. Smith, Jr., relative to these notes. Two questions are herewith presented for our determination: 1st. Is the wording of the mortgage, 'and other livestock * * * now or hereafter belonging to the mortgagor, and now or hereafter situated on the real property', described in the mortgage, sufficiently comprehensive and effectual to cover after acquired livestock having no actual or potential existence at the time of the execution of the chattel mortgage, as against a subsequent lienholder or a judgment creditor?

"2d. Is an agreement between a mortgagee and a mortgagor extending the time of payment of a promissory note, secured by a chattel mortgage, beyond the time prescribed by the statute of limitations, and which agreement is not acknowledged nor recorded, binding upon subsequent lienholders or a judgment creditor?

"We will discuss these questions in the order in which they are hereinabove presented. * * *

[1] "The primary purpose of a chattel mortgage is to transfer the title of personal property to another as security for the payment of money or the performance of contracts or other obligations. It is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession. Civ. Code, § 2920.

"Civil Code, § 2883, provides: 'Lien on future interest. An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest.'

"Section 2930 of the Civil Code provides: 'Subsequently acquired title inures to mortgagee. Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution.'

"The common law required the actual transfer of possession of chattels to make a mortgage thereon effectual; the code, however, substitutes, instead of the actual possession previously required, the recording provisions of the Civil Code. There have been further substitutions and deviations to include property in esse or having a potential existence at the time of the execution of the mortgage, but these latter matters are not involved in the instant case, as it is conceded that the property sought to be covered by the chattel mortgage in question was not in esse and did not have a potential existence at the time of the execution of the mortgage.

[2, 3] "It must be conceded that an individual has a perfect right, under any and all circumstances, to enter into any contractual relations or agreements with a party that he might desire, so long as that contractual relationship does not interfere with the rights of innocent third persons. It must therefore follow that as between the parties to the mortgage, and in view of the code provisions hereinbefore specified, a mortgagor has a right not alone to mortgage property that is in esse or that has a potential existence, but may make an agreement to include within the mortgage any after-acquired personal property. Undoubtedly, in the case at bar the mortgage is effectual as between the parties thereto.

[4-7] "Section 2957 of the Civil Code specifies the incidents upon which a chattel mortgage is void as to third persons, and it seems clear that any chattel mortgage which conforms to the requirements of said section, is not void as to third persons. It must, therefore, follow as a natural consequence that if the mortgage is valid as between the parties thereto, and if there is no prohibition making said mortgage void as to third persons, that the terms thereof must be binding upon those who take with notice; if a mortgage is properly recorded, it is binding upon subsequent lienholders or a judgment creditor to the same extent that it would be binding upon the original mortgagor, and any property included in said mortgage could not be levied upon by attachment or execution. The lien of the creditor could not attach until the levy of the writ of execution of attachment has been made, which would of necessity be after the recordation of the mortgage. The description of the property mortgaged was sufficient. Ramsey v. Furlott, 14 Cal.App.(2d) 145, 57 P.(2d) 1007.

[8] "While this court is not in any way bound by the decisions of the federal courts, nevertheless, the reasoning and logic of the learned justice as set forth in the case of Mason v. Citizens' National Trust & Savings Bank (C.C.A.) 71 F.(2d) 246, a case which arose in this state, and in which the facts parallel the facts in the instant case, are deserving of our approval. After a thorough discussion of the code provisions of California pertaining to questions of this particular kind and character, and after reviewing all of the California decisions applicable thereto, the court, in concluding its opinion, states at page 255: 'To recapitulate, then, we conclude that the California statutes are sufficiently general to include chattel mortgages in their provisions authorizing liens on after-acquired property. We further believe that those provisions do

not contain, either specifically or inferentially, any exceptions in favor of subsequent purchasers, creditors, or encumbrancers, provided that the mortgages are properly recorded. Finally, the decisions of the California courts and the Supreme Courts of other states, as well as the United States Supreme Court and a number of other federal tribunals, have upheld the validity of chattel mortgages on after-acquired property, even as against subsequent lien creditors'. * * *"

While the appellant has cited several cases bearing upon the question of liens being created to take effect upon after-acquired property, which cases we will hereafter cite, the provisions of two sections of the Civil Code seem to completely cover that question. Section 2877, supra, reads: "Contracts of mortgage, pledge, bottomry, or respondentia, are subject to all the provisions of this chapter." Following this section, we find section 2883, supra, contains the following: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time that the party agreeing to give it acquires an interest in the thing, to the extent of such interest." We may also add the language of section 2884, supra, to wit: "A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence." The mortgage involved in this action provided for its obligation upon subsequently-acquired property. The chattel subsequently acquired consisted of a band of sheep.

Thus, in the case of Bibend v. Liverpool Insurance Company, 30 Cal. 78, in considering section 2930 of the Civil Code relative to after-acquired titles, the Supreme Court used language which is applicable here. We quote the following: "It seems to me a clear result of all the authorities that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, under him, either voluntarily, or with notice, or in bankruptcy." Accordingly, the principle set forth in section 2883, supra, was approved in one of the earliest cases touching upon the subject of after-acquired titles. The following cases inferentially, if not directly, follow the rule set forth in section 2883, supra, to wit, Hall v. Glass, 123 Cal. 500, 56 P. 336 69 Am.St.Rep. 77, Mason v. Citizens' Nat. Bank of Los Angeles (C.C.A.) 71 F.(2d) 246, likewise follows the rule, and decided the case before it according to the provisions of section 2883, supra.

[9] The following case may also be cited in support of what we have set forth: Dover Lumber Co. v. Case, 31 Idaho 276, 170 P. 108. Other cases might be cited, but the language of the Code sections which we have quoted seems so clear and decisive as not to call for any interpretation, and that in this case the law is firmly established that a chattel mortgage may provide for the lien applying to subsequently-acquired personal property, and that the lien attaches immediately upon the acquisition of such property by the mortgagor.

[10] In this case the parties entered into an agreement extending the time of payment of the notes referred to and secured by the chattel mortgage. That such an agreement extending the lien of the chattel mortgage is valid and binding as to all parties is amply supported by the following cases: Ekmann v. Plumas County Bank, 215 Cal. 671, 12 P.(2d) 433; Wood v. Willey, 136 Cal.App. 197, 28 P.(2d) 367; Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L.R.A. 673.

[11] The extension agreement appears to have been fully executed between the mortgagor and mortgagee prior to the acquisition of any rights of Byron Burris, Annie Burris, and Evelyn Wright, or any one of them. The contention of the plaintiffs, that no rights were waived by failing to call the extension agreement to the attention of the sheriff at the time the sheep were levied upon, appears to be well taken.

[12] Section 2969 of the Civil Code specifies the action to be taken by an officer making a levy upon mortgaged property, and if an officer levies or sells mortgaged personal property, he is guilty of conversion. 23 Cal.Jur., p. 308.

[13] It also appears from the record that the plaintiffs in this action took a subsequent mortgage upon other property; that the taking of additional security does not waive the lien of a prior mortgage is clearly shown by the following quotation from Corpus Juris, to wit: "The lien of a mortgage is not affected or postponed by the taking of another mortgage to secure

the same debt which is intended to be merely cumulative to the first and not in substitution for it." 41 C.J. 514. We may also cite, to the same point, White v. Stevenson, 144 Cal. 104, 77 P. 828. This mortgage described property other than that included in a prior chattel mortgage, and appears to have been only cumulative.

This cause, as to the damages, to wit, the value of the sheep taken by the sheriff and sold, was tried before a jury. The jury found the value of the sheep to be the sum of $2,254. It is stipulated that the value of the plaintiffs' attorneys' fees was the sum of $250.

It follows from what we have said that the judgment should be reversed, with directions to the trial court to enter judgment in favor of the plaintiffs for the value of the sheep so taken and sold by the sheriff in the sum of $2,254, with attorneys' fees fixed at the stipulated sum of $250, and costs of suit.

We concur: PULLEN, P. J.; THOMPSON, J.

---

23 Cal.App.2d 339

PEOPLE v. THOMPSON.

Cr. 506.

District Court of Appeal, Fourth District, California.

Nov. 2, 1937.

1. Criminal law 🔑442

A conditional sales contract and other documents, bearing signature of another name than that of defendant, were not admissible in evidence on trial for grand theft by obtaining automobile under such name, in absence of evidence that defendant signed, saw, or knew contents of any of them, or ever heard of them before preliminary examination.

2. Larceny 🔑65

Evidence *held* sufficient to support conviction of grand theft by obtaining automobile under name of another than defendant.

3. Criminal law 🔑637

While defendant ordinarily should not be manacled while in court, it may be done in extreme case.

4. Criminal law 🔑1126

A judgment, sentencing one convicted of grand theft to imprisonment for prescribed term commencing at end of sentence he was then serving, will not be reversed as unlawful, on ground that he was sentenced to confinement in state penitentiary for life as habitual criminal at time of trial, where record contains no evidence that he was serving life term, nor even if he were, as sentence for additional term could not be prejudicial to him in such case.

5. Criminal law 🔑1166½(1), 1169(2)

Evidence of defendant's guilt of grand theft *held* so clear and convincing as to preclude reversal of judgment on conviction thereof for errors in admitting certain documents in evidence, denying motion to remove his leg irons during trial, and other errors in record (Const. art. 6, § 4½).

* * *

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

George H. Thompson was convicted of grand theft, and he appeals.

Affirmed.

George H. Thompson, in pro. per.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is an appeal from a judgment pronounced upon defendant after a jury had found him guilty of grand theft, and from an order denying his motion for new trial.

On Sunday, November 22, 1936, defendant, by means of fraudulent representations and under the name of Lloyd E. Ingrim, obtained an automobile from Herring & Kieffer, of Fresno. On the evening of November 26, 1936, the automobile was wrecked on the streets of Fresno. Defendant was arrested the same evening.

Defendant is appearing in propria persona. While his brief is most informal and does not conform to the rules of court, we have studied the entire record and have given it careful consideration.

Defendant makes several specifications of error which may be considered under the contention that the evidence is insufficient to support the judgment and verdict.

[1] There were admitted in evidence a conditional sales contract and other written documents which bore the signature

Lloyd E. Ingrim or L. E. Ingrim. There was no evidence that defendant signed any of these documents, ever saw them, had knowledge of the contents of any of them, or had ever heard of them prior to his preliminary examination. Nevertheless, they were read to the jury. It is so obvious that they were inadmissible, and that defendant's frequent objections to their admission in evidence should have been sustained, that it would seem unnecessary to amplify the reasons or cite authorities in support of this conclusion. Other incompetent evidence was also admitted. In our summary of the facts we will detail only those which we believe are supported by competent evidence.

[2] Defendant came to the salesroom of Herring & Kieffer about noon on November 22, 1936. He looked at automobiles on display and was engaged in conversation by a salesman. He gave his name as Lloyd E. Ingrim, said he was living on a farm near Riverdale and wanted to purchase an automobile; that he had sold some cattle and would receive payment for them the following day. He gave two references, and finally decided on the purchase of an automobile costing in excess of $1,500. The sales manager called up one of the references and approved the sale. Defendant left a check or checks and drove the automobile away from the salesroom. The next morning John Herring, one of the owners of the automobile sales agency, found two checks at the place of business. One was for $500, signed by Lloyd E. Ingrim, and was drawn on the Hanford Branch of the Bank of America. He took the check to the bank and attempted to cash it. Payment was refused because Ingrim had no account in the bank. A bank employee testified that he searched the bank records and found no account in the name of Ingrim. The other check was postdated. It was drawn on another bank, and was not paid on presentation.

Lloyd E. Ingrim testified for the people. He lived at Riverdale. Defendant was his brother-in-law. Ingrim had not been in the place of business of Herring & Kieffer. He had not purchased any automobile. He had not authorized defendant to either purchase one for him or to sign his name to any papers. Defendant was not a farmer, and did not live on a farm near Riverdale. He had recently escaped from jail.

A mere statement of the evidence is sufficient to demonstrate its sufficiency to support the verdict and judgment. There is scant possibility of any doubt of defendant's guilt.

[3] Defendant was brought into court shackled with leg irons. His counsel moved that they be removed. This motion was denied. Defendant sat through the trial in irons. While ordinarily a defendant should not be manacled while he is in court, in an extreme case it may be done. People v. Kimball, 5 Cal.(2d) 608, 55 P.(2d) 483. In the instant case there appears little sound reason for the extreme treatment.

[4] Defendant urges that the sentence pronounced upon him is unlawful. He states that at the time of the trial he was sentenced, as an habitual criminal, to confinement in the state penitentiary at Folsom for the rest of his natural life. In the instant case he was sentenced to imprisonment for the term prescribed by law, imprisonment to commence at the end of the sentence he was then serving. Assuming, without holding, that defendant's contention is sound, there is no evidence in the record to show that he was serving a life term as an habitual criminal. If he is serving such a sentence, and if he serves it out, the imposition of the sentence for an additional term could not be prejudicial to him.

Defendant complains of instructions given by the trial judge, but does not identify any instruction or point out any error. We have read all of the instructions and can find no prejudicial error in them.

[5] While it is true that there are errors in the record, the evidence of defendant's guilt is so clear and convincing that we do not hesitate to say there has been no miscarriage of justice in his conviction. Under such circumstances, we cannot reverse the judgment or order a new trial because of the provisions of section 4½ of article 6 of the Constitution.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

23 Cal.App.2d 292

PEOPLE v. 237 30-LB. CANS OF WHOLE HEN EGGS et al.

Civ. 11496.

District Court of Appeal, Second District, Division 1, California.

Oct. 26, 1937.

1. Appeal and error 🔑1010(1)

Finding of the trial court, when supported by evidence, will not be disturbed.

2. Food 🔑24

In proceedings to condemn canned eggs stored in cold storage warehouse, whether entire lots of canned eggs sought to be condemned were adulterated within meaning of Pure Food Act because representative samples taken from each lot were found to be unfit for human consumption was for trial court where there was no evidence presented from which trial court could infer that any of the eggs were fit for human consumption; "frozen eggs" being articles of trade and commerce prepared by breaking the eggs and in some cases separating the yolks from the albumen, the product then being poured into 30-pound cans and frozen (St.1933, p. 244, § 1101 et seq., as amended; St.1935, p. 1820, § 4).

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by the People of the State of California to condemn 237 30-pound cans of Whole Hen Eggs, designated by Lot No. 7013 and certain other designated lots, wherein Carl Clavin, doing business as the California Co-Operative Poultry Company filed a claim. From a judgment ordering that the eggs be destroyed, the claimant appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DORAN, Justice.

By this action the People of the state of California sought to condemn a quantity of canned eggs on the ground that the same were adulterated within the meaning of section 4 of the act commonly known as the California Pure Food Act (as amended by St.1935, p. 1820), Statutes of 1907, p. 208, c. 181, as amended, in that said eggs consisted in whole or in part of filthy, decomposed, and putrid animal and vegetable substances, and were unfit for human consumption. The eggs in question were in a cold storage warehouse, where they had been delivered at various times over a period of months.

The court found in substance that an average representative sample was taken of the food products in question, and that the eggs were adulterated within the meaning of the Pure Food Act. The judgment which followed ordered that the eggs be destroyed.

[1,2] In the appeal herein from the judgment, the sole contention of appellant is that the evidence does not warrant the finding that all of the eggs were adulterated, for the reason that only a few cans from each lot were sampled and inspected, and found to be adulterated. As to the cans actually sampled and inspected and found to be adulterated, appellant concedes the evidence to be sufficient, but it is urged the samples taken did not constitute an average representative sample.

The evidence shows that frozen eggs are articles of trade and commerce and that they are prepared by breaking the eggs, and in some cases separating the yolks from the albumen, the product then being poured into 30-pound cans and frozen.

Of one lot of 237 30-pound cans of eggs, 21 cans were sampled and inspected. The other lots were sampled and inspected in the following proportion: Of the lot of 164 cans, 14 cans were sampled and inspected; lot of 62 cans, 10 cans were sampled and inspected; lot of 37 cans, 5 cans were sampled and inspected; lot of 99 cans, 6 cans were sampled and inspected; lot of 40 cans, 6 cans were sampled and inspected. It should be noted that at the time the inspection took place and the samples were obtained, an inspector representing the appellant accompanied respondent's inspectors and secured like samples, but, nevertheless, no evidence of any kind was offered at the trial, on behalf of appellant, to the effect that any of the eggs were fit for human consumption.

The finding of which appellant complains is as follows: "That a representative sample of said articles of food were taken, examined and inspected by duly qualified experts on behalf of the plaintiff; that said articles of food hereinabove described are adulterated as defined in section 4 of the act commonly known as the California Pure Food Act (Stats.1907, p. 208, c. 181, as amended) in that said eggs consist in whole or in part of filthy, decomposed and putrid animal and vegetable substance and are unfit for human food as defined in chapter 8, Division 5 of the Agricultural Code of the State of California [St.1933, p. 244, § 1101 et seq., as amended]."

But two authorities are cited in support of appellant's contention: In the first, Baker v. Latses, 60 Utah 38, 206 P. 553, 556, appears the following: "It stands to reason that public health officers have no right to confiscate and destroy articles of food in bulk simply because some portion may be affected and unfit for use when the good can be detected from the bad and readily separated before being used, provided, of course, the spoiled portion does not contaminate the whole. In our judgment neither the letter nor the spirit of the statute invoked in this case required the officer to confiscate and destroy the defendant's potatoes, and the consequences of his acts in that regard should not be visited upon the plaintiff;" in the second, United States v. Two Hundred Cases, More or Less, of Canned Salmon (D.C.) 289 F. 157, 160, the court made the following observation: "It might well be as in the oyster case * * * that where only a part of the shipment was examined, and that part ran uniformly bad, the jury would be authorized to find, if that was a fair sample, that it indicated that the whole shipment was bad; but it would not at all follow, but rather the contrary, that if a shipment was examined, and the examination showed as it proceeded that one-fifth was bad and four-fifths good, that the court could order the whole product condemned."

It will be seen that the facts in the two cases just quoted were entirely different from the facts in the case at bar. In the first case, for example, it was evident that not all of the potatoes were unfit for use, and, as the court stated in substance, inasmuch as the good could readily be separated from the bad and the spoiled portion did not contaminate the whole, to destroy the good, under such circumstances, was without reason. In the instant case there was no evidence presented to the court from which the court could infer that any of the eggs were fit for human consumption.

In the second case above quoted, the court declared in substance that it did not necessarily follow that because the examination of a shipment showed, as it proceeded, that one-fifth was bad and four-fifths were good, that the court could order the whole product condemned. In the instant case, no such situation or a like situation is presented. To the contrary, the record reveals that of the cans of eggs sampled and inspected, with the exception of 3 cans of a certain lot, about which no complaint is made, all were found to be adulterated or otherwise unfit for human consumption.

The doctrine to the effect that the finding of the court, when supported by the evidence, will not be disturbed on appeal, is clearly appicable and disposes of the only question raised by the appeal herein.

The judgment appealed from is affirmed.

I concur: YORK, P. J.

MONDINE v. SARLIN et al.*

Civ. 11552.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1937.

Rehearing Denied Nov. 18, 1937.

1. Explosives 🔑9

Evidence that while gasoline was being pumped from a seller's storage tank to a buyer's tank truck, by means of an electric motor-driven gasoline pump, an explosion occurred injuring the buyer, does not warrant a finding of negligence on the part of the seller where the motor and pump had been used for a long time without any indication that they were a source of danger, and there was no evidence that they were defective or that others engaged in a similar business did not consider it safe to use like equipment for such purpose.

2. Negligence 🔑59

A defendant is not liable for, nor required to guard against, casualties which have not been known to have occurred, and which may not be reasonably anticipated.

3. Negligence 🔑121(2)

When that which never happened before and which in its character is such as not naturally to occur to a prudent man to guard against, does occur, the mere happening of the event does not furnish good ground for a charge of negligence in not foreseeing the occurrence and guarding against it.

---

*For subsequent opinion see 81 P.2d 903.

4. Negligence ⚷121(2)

The doctrine of res ipsa loquitur applies only where the instrumentality causing damage is in the possession and under the control of the defendant.

5. Explosives ⚷9

Where a seller of gasoline, after starting the motor attached to a gasoline pump for the purpose of pumping gasoline from his storage tank to a buyer's tank truck, left the scene and the buyer, who had operated the pump on many occasions, had exclusive possession and control at the time of an explosion and for some period prior thereto, the doctrine of res ipsa loquitur is inapplicable.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Joe Mondine against Jean P. Sarlin and others. From a judgment for plaintiff, the defendant named appeals.

Reversed.

Joseph Scott, J. Edward Keating, and Robert F. Shippee, all of Los Angeles, (J. Howard Ziemann, of Los Angeles, of counsel), for appellant.

E. D. Reiter, Ellis D. Reiter, Walter S. Barrette, and Francis M. Reiter, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries defendant Sarlin appeals.

Viewing the evidence most favorable to plaintiff, the pertinent facts are:

At about 7:45 a. m. on May 1, 1936, plaintiff drove his tank truck onto the premises of defendants' oil petroleum products plant for the purpose of buying gasoline. Defendants' dispensing tank was empty and plaintiff agreed to use his own tank truck to move some gasoline from one of the storage tanks to the dispensing tank. This operation was undertaken in the following manner:

An electric, motor-driven gasoline pump was placed in position so that gasoline could be pumped from the storage tank to the tank on plaintiff's truck. The pump was connected to the storage tank by a hose belonging to the defendants while a hose belonging to the plaintiff was connected to the outlet of the pump, the other end of which was placed unsecured in an opening at the top of the tank on plaintiff's truck. Defendant Sarlin, after turning on the electricity which started the motor attached to the gasoline pump, left the scene, going into his office and not returning until after the accident hereinafter described.

Plaintiff, who had operated the electric gasoline pump previously on more than one hundred occasions, observed several times during the eight or ten minutes after the pumping started the pump and motor to see that they were functioning properly. He then climbed on his truck to see how much gasoline had been pumped into the tank and on turning to look again at the gasoline pump he observed sparks four or five inches long shooting from the motor. He immediately descended from his truck and started toward the motor to pull the plug from the socket at the motor in order to break the electrical circuit. When within a short distance from the motor an explosion occurred, and the hose leading from the motor to the tank truck sprayed plaintiff with gasoline which, becoming ignited, resulted in his being seriously burned.

[1] The only question presented for determination is this: *Was there substantial evidence to sustain the implied finding of the jury that defendant was negligent in the maintenance or operation of the motor and gasoline pump, which was the proximate cause of plaintiff's injury?*

[2, 3] This question must be answered in the negative. It is the settled law of this state that a defendant is not liable for nor required to guard against casualties which have not been known to have occurred and which may not be reasonably anticipated. It is likewise settled that, when that which never happened before and which in its character is such as not naturally to occur to prudent men to guard against, does occur, the mere happening of the event does not furnish good ground for a charge of negligence in not foreseeing the occurrence and guarding against it. Morris v. Southern Pacific Co., 168 Cal. 485, 490, 143 P. 708.

In the instant case an examination of the record discloses that the motor and gasoline pump which were the cause of the injury had been in use for a long time without ever having given any indication that they were a source of danger. There is no evidence that either the motor or pump was defective in any particular or that others engaged in a similar line of business did not consider it a safe practice to use like equipment for the purposes for which the motor and pump in the instant case were being used.

It therefore is clear, applying the above stated rule of law, that the unfortunate accident which resulted in serious injury to plaintiff was an unavoidable accident, which defendant by the use of reasonable care could not have avoided, and, therefore, there was not any negligence for which defendant properly could be held liable.

[4, 5] The doctrine of res ipsa loquitur applies only where the instrumentality causing damage is in the possession and under the control of the defendant. Hernandez v. Southern California Gas Co., 213 Cal. 384, 388, 2 P.(2d) 360; 19 Cal. Jur. 709 (1925); 8 Cal. Jur. 10 Yr. Supp. 384, § 125 (1936). Hence, in the instant case this doctrine is inapplicable, since it is conceded that the motor and pump at the time of the accident and for some period prior thereto were in the exclusive possession and under the control of plaintiff.

For the foregoing reasons the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.